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IMPLEMENTATION OF TAIWAN RELATIONS ACT:  
ISSUES AND CONCERNS

HEARINGS  
BEFORE THE  
SUBCOMMITTEE ON  
ASIAN AND PACIFIC AFFAIRS  
OF THE  
COMMITTEE ON FOREIGN AFFAIRS  
HOUSE OF REPRESENTATIVES  
NINETY-SIXTH CONGRESS  
FIRST SESSION

FEBRUARY 14 AND 15, 1979

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## PREFACE

On December 15, 1978, President Carter completed the work of 7 years, and of two of his predecessors, by announcing the establishment of full diplomatic relations between the United States and the People's Republic of China, to be effective January 1, 1979.

As was clear at the time, the United States undertook these steps with mixed emotions, for in order to recognize the People's Republic of China as the government of the mainland, we had to sever formal ties with our longtime friend and ally, the Republic of China, on Taiwan.

The following hearings were conducted by the Subcommittee on Asian and Pacific Affairs in February to supplement and parallel those held simultaneously by the Committee on Foreign Affairs. Both sets of hearings detailed the concerns dominating the many issues surrounding normalization, which the Congress was being asked to ratify, in effect, through the vehicle of the Taiwan Relations Act.<sup>1</sup>

### CONGRESSIONAL CONCERNS

Thus, while the many strategic issues inherent in the triangular relationship between the United States, the Soviet Union, and the People's Republic of China were discussed in detail in the following hearings, as well as in the committee hearings, and in the Congress as a whole, the central debate was over two areas relating to Taiwan in the administration's proposed legislation. These were, first, concern over the security question in the wake of notification of the ending of the Mutual Defense Treaty between Washington and Taipei, and second, how the future economic and social well-being of the people on Taiwan would be promoted under the new, unofficial relationship.

All witnesses agreed that as a general proposition, normalization between the United States and the People's Republic of China was a positive step, a logical, inevitable one, which, if properly carried out, could serve to enhance our long-term interests in the world, including the prospects for peace and stability in Asia.

### ADMINISTRATION BILL SHORTCOMINGS

However, the nonadministration witnesses agreed that the original proposals outlined by the administration failed to address the security concern, or the needs of the people on Taiwan, or of the private, commercial interests which were to form the bedrock of the new, unofficial United States-Taiwanese relationship.

In the early months of the normalization debate, primary focus was placed on finding an adequate, though unofficial, substitute for the Mutual Defense Treaty. A recent lower court decision has cast possible doubt on the immediate future of the Mutual Defense Treaty, which, technically, remains in effect until January 1, 1980.<sup>2</sup>

<sup>1</sup> See app. 5 for text of the Taiwan legislation adopted by the Congress and signed into law by President Carter on Apr. 10, 1979.

<sup>2</sup> See app. 4 for complete text of the Mutual Defense Treaty.



Whatever the outcome of this legal situation, which involves serious constitutional and parliamentary issues, in February, a compromise was worked out by the House and Senate with the administration, along the lines of the legislation introduced by Senators Kennedy and Cranston, and in the House by myself, as chairman of the Asian and Pacific Affairs Subcommittee.<sup>3</sup> The details of this legislation are fully covered in the first of the following hearings, with statements from Senators Cranston and Kennedy, and in dialog between subcommittee members and administration witnesses.

#### BACKGROUND TO COMPROMISE

As a result of the normalization agreement between the United States and China, the United States met Peking's longstanding "three conditions," the "derecognition" of Taipei, the termination of the Mutual Defense Treaty, and the withdrawal of U.S. forces from Taiwan. In return, the United States retained the right to continue to sell Taiwan defensive arms and to carry out the full range of nonofficial relations. In particular, the United States was assured by Chinese officials including Deng Xiaoping that it could follow the so-called Japanese Formula for continued economic and social relations with Taiwan.

These public assurances dovetailed with those enunciated privately when the subcommittee visited Peking in July 1978.<sup>4</sup> At that time, Vice Premier Deng indicated that China was prepared to do what it could to foster peaceful conditions of settlement between Peking and Taipei. However, the Vice Premier then, and in his subsequent journey to Washington this January, repeatedly refused to rule out the use of force, if ultimately necessary, to reunite Taiwan and the mainland.

While there was thus some give and take between Washington and Peking, in which the subcommittee played some part, problems immediately arose following the President's announcement due to China's refusal to rule out the use of force against Taiwan. This, coupled with the agreement by the administration to terminate the Mutual Defense Treaty, made Congress aware of the need to reassure the private and business communities—in addition to the people on Taiwan—that the Taiwan legislation would help safeguard the island's security without the "umbrella" of security implied by the defense treaty.

An additional problem—one wholly unnecessary, in my view—was the issue of prior consultation, during the final stages of the negotiations. This issue has been fully aired, and there is no need to repeat the many points raised during the debate, and in the following hearings.<sup>5</sup> For the future, however, the concern remains that Presidents will continue to present the Congress with foreign policy "faits accomplis," in which we have a choice of either appearing to obstruct or serving as a rubber stamp.

<sup>3</sup> See paper by Jonathan B. Eddison, Georgetown University Law Center, "The Separation of Powers and the Termination of Treaties" (p. 35 of the hearings), statement by Hon. Barry M. Goldwater, U.S. Senator from Arizona "Analysis of Presidential Treaty 'Terminations' Argued in State Department Memorandum" (p. 122).

<sup>4</sup> "A New Realism: Factfinding Mission to the People's Republic of China, Aug. 3-13, 1978", by the Subcommittee on Asian and Pacific Affairs, U.S. Government Printing Office, 1978.

<sup>5</sup> See app. 2, letter to President Carter from Chairman Clement J. Zablocki and Hon. Lester L. Wolff, dated Dec. 19, 1978.



## COMPROMISE ACHIEVED

In any event, after several weeks of debate, during which both the House and Senate in effect ratified normalization by voting to reject amendments which would have contradicted the normalization agreement between Washington and Peking, a compromise version of the Taiwan implementing legislation was achieved.

Key to the compromise was the Kennedy-Wolff legislation, which took the form of an additional section to help insure the maintenance of peace in the area, as well as Taiwan's security. The House version, with more than 100 cosponsors, was incorporated into the Foreign Affairs Committee redraft of the administration bill. Likewise, the Senate incorporated the Kennedy-Cranston resolution into its legislation, and the conference committee endorsed the agreement.

As the law now stands, while Taiwan will no longer be protected by a formal treaty (assuming termination as scheduled on January 1, 1980) the President retains the power under the War Powers Resolution to take steps, with the consent of Congress, deemed necessary to protect U.S. interests on Taiwan.

These interests are defined to include the continued peace and well-being of the people on Taiwan, and the President is directed to report to the Congress any threat to these interests.

The legislation specifically covers the threat of boycott or blockade, in addition to then-existing legislation governing our international relations. Finally, the Kennedy-Wolff and committee amendments noted that a threat to Taiwan's security would constitute a threat to the peace and security of the region.

While the administration repeatedly refused to endorse Kennedy-Wolff, maintaining that such guarantees were not needed, its witnesses agreed to work with us in achieving the compromise which was finally accepted by all parties.

## ADMINISTRATION ASSURANCES

I make this point because of the importance we attached at that time to testimony by administration witnesses on the nature of the various guarantees—both implicit and explicit—which they maintained would still operate for Taiwan in the wake of normalization with the People's Republic of China.

Of particular interest was testimony to the subcommittee by Assistant Secretary of State for East Asia Richard Holbrooke, Deputy Secretary of Defense Michael Armacost, and their staffs, on the nature and capacities of the U.S. defense commitment to Taiwan without the Mutual Defense Treaty. Key sections of this testimony appear on pages 19-21, and 49-51, and should be noted by those concerned with how the administration proposed to deal with questions of Taiwan's continued peace and prosperity in the event of future tensions.

The security questions tended to dominate both press and legislative concern during the debates of January and February. However, also of major interest to the Congress, and particularly to the business community, was the lack in the proposed administration bill of specific safeguards for continued economic and social relations between the Taiwanese people and the American people.

## CONTINUATION OF TREATIES AND AGREEMENTS

As testimony in the following hearings demonstrates, the business community particularly wanted the United States to maintain the 55 or so treaties and agreements between Washington and Taipei which would not immediately be affected by the normalization agreement. Many in the Congress and elsewhere shared this concern on the grounds that terminating or abrogating treaties and agreements beyond the defense pact could undermine the legal stability of continued commercial intercourse between the United States and the people on Taiwan.

While this would be a major concern of the Congress under normal circumstances, the fact that the new United States-Taiwanese relationship was to be entirely unofficial made the question of the business and commercial continuity of paramount importance.

In response to this concern, administration witnesses testified to the subcommittee that with the exception of the Mutual Defense Treaty, the President intended to keep in force the approximately 55 other treaties and agreements in question.

Specifically, Secretary Holbrooke, on page 12, assured the subcommittee of the following:

We also could not agree to declaring our treaties and agreements with Taiwan null and void. The President had determined that except for the ending of formal diplomatic relations and the Defense Treaty relationship, we would maintain the broad range of substantive ties with Taiwan in commerce and investment, in travel and tourism, and in cultural interchange. These treaties and agreements were exceedingly important to that goal, because without them we could not continue, for example, cooperation in the peaceful uses of atomic energy; and the ending of the Treaty of Friendship, Commerce and Navigation and the orderly marketing agreement would have a deleterious effect on our and Taiwan's essential business interests.

## CONGRESSIONAL UNDERSTANDING

In short, the subcommittee, and the Congress as a whole, felt it was being assured that in return for accepting the President's normalization agreement with Peking, as amended to meet security and economic considerations, we could count on maintenance of the great majority of the treaties and agreements precisely because they were needed to safeguard the interests of the American people and the people on Taiwan.

At this writing, and in the wake of Vice President Mondale's announcement, while visiting China, that an aviation agreement between Washington and Taipei will be abrogated, concern on many sides has arisen over Secretary Holbrooke's testimony before the subcommittee, and similar testimony by the administration in other forums. Since the Vice President's announcement, the administration has notified the Congress that as the renewal dates become due on agreements and treaties, new, private arrangements will have to be substituted—an apparent reversal of the promises made during the testimony in February.

Thus, quite apart from the legal ramifications of the court decision on the Mutual Defense Treaty, serious questions may arise as to the basic agreement in principle between the Congress and the administration on the Taiwan implementing legislation.



The subcommittee did not in February and does not now oppose creation of the American Institute on Taiwan, the private corporation set up to facilitate continuation of the nongovernmental, unofficial relations between the United States and the people on Taiwan. However, in light of the Vice President's announcement and the subsequent administration notification regarding the new arrangements needed, the subcommittee is concerned that previous assurances by the administration to the Congress may be subject to revision.

Obviously, the many issues of the triangular relationship between China, the United States, and the Soviet Union, such issues as SALT and MFN, and concerns such as human rights, and the tensions between Vietnam, China, and the Soviet Union, all form part of the larger picture which must be monitored by the subcommittee and the Congress.

The appendixes to the present hearings include items designed to supplement the specific issues involved in the days between December 15, 1978, and April 10, 1979, as they regard the legislative concerns of the Congress.

The views expressed in this preface are those of myself as chairman of the Subcommittee on Asian and Pacific Affairs, and do not necessarily reflect the views of any other member of the subcommittee or of the Committee on Foreign Affairs.

LESTER L. WOLFF,  
*Chairman, Subcommittee on Asian  
and Pacific Affairs.*

*Washington, D.C.,* NOVEMBER 1979.





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## IMPLEMENTATION OF TAIWAN RELATIONS ACT: ISSUES AND CONCERNS

WEDNESDAY, FEBRUARY 14, 1979

HOUSE OF REPRESENTATIVES,  
COMMITTEE ON FOREIGN AFFAIRS,  
SUBCOMMITTEE ON ASIAN AND PACIFIC AFFAIRS,  
*Washington, D.C.*

The subcommittee met at 2 p.m. in room 2172, Rayburn House Office Building, Hon. Lester L. Wolff (chairman of the subcommittee) presiding.

Mr. WOLFF. The subcommittee will come to order.

Our witnesses today are Hon. Richard Holbrooke, Assistant Secretary of State for East Asian and Pacific Affairs, and Michael Armacost, Deputy Assistant Secretary of Defense for East Asian and Pacific Affairs, and members of their staff, including Mr. Harvey Feldman, who are playing a prominent role in the normalization process.

The topic of today's hearing is the administration's China policy—how it has been handled, what it is, and where we all go from here. In particular, we will seek testimony from our witnesses on two pieces of legislation, the administration's own H.R. 1614, the so-called omnibus bill for continued relations between the United States and the people on Taiwan, and House Joint Resolution 167, introduced by myself with nearly 100 cosponsors, which would provide an explicit U.S. statement on the future security of Taiwan. As you know, this measure has been introduced in the other body by Senators Cranston and Kennedy, with more than 30 cosponsors.

I had hoped that Senator Kennedy and Senator Cranston could appear today to discuss our legislation, but as the other body is not in session this week, they were unable to attend. However, they have provided us with statements for the record, which, without objection, will be included at the outset of the printed record.

Our hearings will continue tomorrow at 1 p.m. with witnesses from private industry, as well as from past administrations, such as Mr. Winston Lord, formerly of the policy planning staff, Hon. Walter McCaughy, former U.S. Ambassador to Taiwan, and Adm. Noel Gayler, former CINCPAC. We have also been in contact with former Presidents Nixon and Ford, and former Secretary of State Henry Kissinger, among other historical figures, regarding their thoughts on the present situation.

### SECRET AGREEMENTS

One of the basic reasons for contacting these former members of the U.S. Government is to determine whether or not there have been any

prior agreements or prior understandings that led up to normalization but which we in the Congress are not yet aware of.

Today, and in the coming weeks, we will focus on four major areas:

First, as noted, we will need to know—and we ask this of our witnesses as well today—just what prior arrangements—or secret agreements, have been made over the years, which affected the normalization process announced by the Carter administration.

Particularly, it has come to my attention that a secret arrangement in the economic field exists, in addition to the apparent agreement not to sign new arms contracts with Taiwan this year, which has already come to light. The Foreign Affairs Committee last week voted to require full disclosure of any other agreements that have been made.

#### CONGRESSIONAL CONCERNS

Second, we are particularly concerned over what can be defined as the “security issue” addressed by House Joint Resolution 167, and by other measures in both bodies. I note that over the weekend, President Carter made his strongest statement to date on Taiwan’s security, and I hope today’s witnesses will discuss the details and impact of the President’s remarks.

Third, we are also concerned that the so-called omnibus bill, H.R. 1614, while full of good intentions, nonetheless lacks specificity; particularly, the charge has been made that it is too imprecise or too open ended to provide the people on Taiwan or the U.S. business community the legal guarantees they need to carry on our traditional economic and social relationships.

Regarding the omnibus bill, of course, there are a host of questions, including the name of the private U.S. corporation we are being asked to approve, which I know we will discuss in detail in the coming days ahead.

Finally, the fourth major area we will examine might best be characterized as the future or the implications of our China policy as it has been articulated to date by the administration.

Such questions as the effect of normalization, and the remarks of President Carter and Vice Premier Deng Xiaoping on the triangular relationship between China, the United States, and the Soviet Union, particularly come to mind. Despite claims to the contrary, the distinct impression has been made that we have indeed played the “China card” against the Soviet Union. The grave implications for world peace inherent in this need to be fully explored.

[The statements of Senators Kennedy and Cranston follow:]

#### STATEMENT OF HON. EDWARD M. KENNEDY, U.S. SENATOR, STATE OF MASSACHUSETTS, ON JOINT RESOLUTION ON TAIWAN (S.J. RES. 31)

Mr. Chairman, I am pleased to submit this statement in support of S.J. Res. 31, cosponsored by Senator Alan Cranston in the Senate and Rep. Lester Wolff in the House of Representatives, regarding the “peace, prosperity, and welfare of the people on Taiwan and the Pescadores.”

Twenty-eight Senators have now joined us in cosponsoring this resolution, and I understand that an equally substantial number of Congressmen have now joined Congressman Wolff in cosponsoring the same Resolution in the House of Representatives.

Mr. Chairman, I welcome the broad base of support, ranging across the political spectrum, which is reflected in the cosponsorship of this Resolution. I believe



this demonstrates understanding in the Congress that, as we normalize relations with the People's Republic of China, we can and should provide for the future peace and well-being of Taiwan.

If the Congress enacts both this Resolution and the omnibus legislation submitted by the President, I am confident that our ties with the people on Taiwan will not only remain unimpaired, but will actually be enhanced in the months and years ahead.

First, our ties should be unimpaired because they should remain the same in substance even though they change in form. The Administration's legislation provides for substantive continuity in "commercial, cultural and other relations," of unofficial instead of official terms. Our Joint Resolution provides for substantive continuity in the vital security sphere, also on unofficial terms.

Second, our ties should actually be enhanced because we have finally removed Taiwan as a diplomatic issue between China and the United States. No longer do the Chinese feel duty-bound to object to official relations based on our past pretense that the government of 17 million controls a nation of almost one billion. In turn, the Chinese have agreed to continued unofficial ties between us and Taiwan—ties which should expand and strengthen just as Japan's did after it normalized relations on the same basis in 1972. It is no accident that Japanese trade with Taiwan as well as with the mainland has quintupled since normalization, from roughly \$1 billion each in 1971 to over \$5 billion each in 1978.

We look forward, Mr. Chairman, to working with you and the Committee in incorporating the areas covered by our Resolution in the legislative package to be submitted to both Houses of Congress. Indeed, we favor developing a single package with both security and non-security elements, which incorporates the Administration's proposals as well as our own. Whatever the final shape of the package, we hope that it will reflect the following elements which constitute the core of our approach:

Confirmation of our continuing interest in the peaceful resolution of the Taiwan issue;

Provision for continuing defensive arms sales to Taiwan;

Consultation between the Executive and Legislative Branches on any danger to the peace, prosperity, and welfare of Taiwan; and

Provision for meeting any such danger in accordance with our Constitutional processes and legislative requirements, including the War Powers Act.

This approach is consistent with the agreed terms of normalization. Unlike other proposals, it does not involve official relations with Taipei, which would contradict our recognition of Peking as the sole legal government of China. Nor does it permit unilateral action by the President, without necessary Congressional participation. Nor does it commit our country to specific actions under hypothetical circumstances—a policy which successive Presidents and Congresses have wisely refused to adopt.

Instead, we should do no more nor less than our existing security commitments to allies in Europe and Asia. Article V of our 1954 treaty with Taiwan provides for the United States to "act to meet the common danger in accordance with its constitutional processes." It does not provide for unilateral Presidential action, and it does not commit us to specific actions under hypothetical circumstances. Similarly, our Joint Resolution provides for Presidential consultation with the Congress and confirms the policy of the United States to act to meet any danger to Taiwan "in accordance with its constitutional processes and procedures established by law."

What this approach does accomplish is Congressional reinforcement of the President's welcome declarations on the peaceful resolution of the Taiwan issue by the Chinese themselves. The capabilities and policies of both Taipei and Peking now contribute to such a prospect. So will a Congressional expression of confidence and readiness to act in even the unlikely event of a danger to the peaceful well-being of Taiwan.

Mr. Chairman, Senator Goldwater and others have argued that the President lacked authority to give one year's notice of termination of our mutual defense treaty with Taiwan—in spite of that treaty's explicit provision for such termination under its Article X, which states that "Either Party may terminate it one year after notice has been given to the other Party." I have carefully examined the constitutional and historical basis of these objections, and I am personally convinced that the President had full authority to take the actions he did to normalize relations with Peking, including termination of the defense treaty with

Taipei. I have set out the reasons for this conclusion in an article to appear in this month's issue of the American Bar Association Journal.

While focusing on the exact terms of normalization for both Taiwan and the Chinese mainland, I believe that we should all bear in mind the broader context in which these terms have become possible. There are some who say that normalization was a reflection of American weakness. I say the opposite. Normalization is a reflection of American strength: Our strength to recognize the reality of nearly one billion people controlled not by Taipei but by Peking. Our strength to act with responsibility to the 17 million people on Taiwan, with whom we have enjoyed close ties for over three decades. Our strength to consolidate and strengthen relations with the creative, industrious and rapidly modernizing Chinese people, and thus to contribute to the peace and stability not only of Asia but of the world.

It is in that framework of confidence and strength that we can take the right steps to maintain a full, unofficial relationship with the people of Taiwan—in an environment of enhanced security and peace for all of us.



STATEMENT OF HON. ALAN CRANSTON, U.S. SENATOR, STATE OF CALIFORNIA, ON  
JOINT RESOLUTION REGARDING TAIWAN (H.J. RES. 167)

I am pleased to have the opportunity to submit this statement on the omnibus legislation concerning the future of United States relations with the people on Taiwan and the Pescadores.

The President's decision to establish full diplomatic relations with the People's Republic of China was a necessary decision -- a decision based on the simple recognition that the Peking government is the actual government of some 900 million Chinese. I support the President's realistic decision.

The United States and Taiwan have had a long and valued friendship. I fully support the continuation of the close educational, cultural, scientific and commercial ties between the people of the United States and the people of Taiwan. As the United States enters an era of official relations with the People's Republic of China, we must maintain and preserve our relations with Taiwan, but now through unofficial, but no less substantive means. Therefore, I am generally pleased



with the legislation that the Administration has submitted for the continuance of economic, cultural, scientific, educational, and commercial bonds with Taiwan.

However, I believe there is a significant element absent from the Administration proposal. Because of the importance of the overall security of Taiwan and the Pescadores, Senator Kennedy and I, along with 27 other Senators, introduced a joint resolution (S. J. Res. 31) which requires action by the President and Congress to maintain the peace, prosperity, and welfare of the people on Taiwan. Such action will be taken by the President and Congress in accordance with constitutional processes and procedures established by law in the event of any danger to the interests, concerns and expectations of the United States in the peace, prosperity, and welfare of Taiwan.

A similar joint resolution was concurrently introduced by Congressman Wolff in the House and is now before this committee (H. J. Res. 167).

The White House and the Congress appear to have a difference of opinion regarding the necessity of such a resolution. The White House (although perhaps not the State Department) believes the resolution is unnecessary -- presumably because it believes the agreement President

Carter reached with the Chinese government adequately assures the security of Taiwan. I support the United States-China agreement and believe it is adequate for the security of Taiwan. But it is not so perceived by some members of Congress -- as evidenced by the number of other Taiwan resolutions which have been introduced. Nor is it so perceived by much of the American public -- as evidenced by the polls. The corresponding resolution Senator Kennedy and I have introduced in the Senate and the resolution here considered are intended to correct any misperception that recognition of the Peking government is automatically translated as abandonment of Taiwan. Resolutions spell out what the United States-China agreement implies, but leaves unsaid.

I am encouraged that Vice Premier Deng Xiaoping, during his recent visit to our nation's capitol, reiterated the wish of his government that the issue of Taiwan's reunification be resolved peacefully. I do not think it serves anyone's interest to settle it by any other means. The Chinese are known for their patience, as the Chinese leader has stated. The Chinese are also proud. I believe it is more out of national pride and sovereignty that Peking will not rule out the use of force against Taiwan than because force is a viable

option. But since the People's Republic of China will not give an express pledge not to use force against Taiwan, the United States should refrain from closing its own options to respond -- in the unlikely event that force is used. Our resolution is designed to maintain security for the people on Taiwan and to retain the U. S. option of flexible response.

The United States has stated that it expects the issue of Taiwan's reunification with China will be accomplished peacefully. The resolution is not intended as a warning to Peking -- unless that be necessary -- but as an assurance to the people of the United States and the people of Taiwan who are concerned about the security of Taiwan. It is important, now, at the outset of a new relationship with China, that this concern be clearly expressed by Congress.

These resolutions clearly express the concern of Congress for the people of Taiwan, and provide assurances for the continued peace, prosperity, and welfare of the people on Taiwan and the Pescadores. These resolutions enjoy the broad bipartisan support of both the House and the Senate. In the Senate, the list of cosponsors now numbers 29 and includes Senators Baucus, Bayh, Bentsen, Biden, Bumpers, Durkin, Eagleton, Exon, Gravel, Hayakawa,



Inouye, Johnston, Levin, McGovern, Metzenbaum, Nelson, Pell, Pressler, Proxmire, Randolph, Ribicoff, Sasser, Stafford, Stennis, Stevenson, Tsongas, and Williams. And I understand that in the House some 100 members are cosponsors.

I think such a resolution is necessary and appropriate. And I think the White House will accept such a joint resolution as law when passed by both the House and the Senate. I hope that you of this committee in your deliberations will concur and recommend the resolution favorably to the full House -- or incorporate its substance in whatever legislation you report concerning our future relations with Taiwan.

Thank you.

Mr. WOLFF. Before asking Secretary Holbrooke and Secretary Armacost to present their opening statements, I must make the point which has been made repeatedly since the President's surprise announcement of December 15—that many of the questions and most of the reservations which have been expressed to date could have been avoided if the administration had conducted prior consultations with the appropriate committees and subcommittees of the Congress in a timely fashion.

#### CONSULTATION LACK

I know that consultations have been held on the question of normalization with China but I am not too aware of consultations that were held on the disposition of our relationship with Taiwan, hence the need for not only today's hearing, but others that will follow, and the many questions I am sure we will deal with in the days ahead.

At precisely 3 o'clock, the committee will recess for an important announcement from the State Department that relates to the work of this committee; it relates to a situation regarding the MIA issue in Vietnam.

I hope the Secretary and others who are here will excuse us if we break into our normal hearings for this important announcement. Therefore, with that in mind, I ask Assistant Secretary Holbrooke—

Mr. SOLARZ. Before you ask the witnesses to testify, could I just ask you whether we have a date yet for when our recommendations will be marked up in the subcommittee, when the full committee will be marking up the legislation as well?

Mr. WOLFF. The full committee is supposed to mark up the omnibus bill beginning on Friday of this week. However, that has not been set finally because of the holiday intervening. However, the latest information I have is that the omnibus bill will be marked up at that time. We are not certain yet of the date of our markup of H.R. 1614.

Mr. SOLARZ. Well, my impression is we are supposed to make our recommendations for the full committee before the full committee reports a bill out.

Mr. WOLFF. That is correct.

Mr. SOLARZ. If I am not mistaken, today is Wednesday, Friday is 2 days from now. Are we planning to meet later today or tomorrow to mark this up?

Mr. WOLFF. We are planning to meet, and as I have indicated to the subcommittee in our subcommittee organization meeting, we will meet night and day if needed. Unfortunately, the administration has given us a very short leash upon which to act. It is within those constraints of time we have to act.

Mr. SOLARZ. Do you anticipate the full committee will be put off, or will we have to do our work by tomorrow?

Mr. WOLFF. I can't say until the end of the day. I understand the chairman of the full committee is going to give us some indication as to whether or not the markup will be on Friday morning.

Mr. SOLARZ. You will, I assume, reserve the right of the subcommittee to consider this before it gets to the full committee?

Mr. WOLFF. That is my intention.

Mr. SOLARZ. We stand behind you, Mr. Chairman.



Mr. WOLFF. Thank you. I hope you will stand behind me on all measures like that in the future.

Mr. Secretary, will you please proceed.

**STATEMENT OF HON. RICHARD HOLBROOKE, ASSISTANT SECRETARY OF STATE FOR EAST ASIAN AND PACIFIC AFFAIRS**

Mr. HOLBROOKE. Thank you, Mr. Chairman. It is a pleasure to appear again before your subcommittee and to appear for the first time before those members of your subcommittee who have joined it since the last session.

I am very pleased to have this opportunity to appear before you today in support of H.R. 1614, to urge favorable consideration of that bill by your committee and by the full House. Inasmuch as Deputy Secretary Christopher has already testified at some length before the full committee as to the bill itself, I would like principally to discuss the overall context of normalization and the new strategic situation in Asia which it has created. I would like to begin with a quotation that will, I believe, set the scene as the Chinese saw it in the months immediately preceding December 15, 1978:

Again and again, we heard the Chinese rightfully discuss their strengths, but frankly discuss their weaknesses, and indicate their desire for constructive suggestions from the United States.

Again and again, we saw evidence that the new realism is leading the Chinese to be receptive to American expertise to help them overcome the lost decade of the Cultural Revolution and the so-called "Gang of Four."

This emerging realism is the most striking contrast between China today and that of two years ago and is, we feel, a most favorable impulse toward normalization of relations between our two governments. While the Chinese remain determined to pursue self-reliance, they appear to be no longer adverse to making use of the best from other nations—a policy rooted in Chinese tradition and which continued through the 1950's prior to the Sino-Soviet split.

In this respect, it is the delegation's opinion that the Chinese see their relationship with the United States as part of an overall strategic and political recognition of realities, which they see as an increasing pattern of Soviet activity around the globe—from Angola to South Yemen, from Afghanistan to Ethiopia and Vietnam.

Hence the Chinese see an improved relationship with the United States as being in the common interest of both countries.

**CODEL WOLFF**

I think there can be no more accurate description of the impulse which moved the Chinese to reach agreement with us last December on normalization than this quotation which, I am sure you all recognize, is from a statement made by Chairman Wolff precisely 6 months earlier, on July 15, 1978.

Thus the Chinese had an interest in reaching an early agreement on normalization, as did the United States. We saw it not as an anti-Soviet measure, but as something clearly a matter of strategic importance to us to have normal, cooperative relations with the Government of an area as large as all of Europe and with a population of between 950 million and 1 billion people.

We knew too that we could not forever stand pat on the basis of the Shanghai communique. As this subcommittee itself said in a report



published in December, the appearance of inaction, signifying no desire on our part to achieve full state-to-state relations, had the potentiality of seriously damaging United States-China relations.

#### NEGOTIATIONS

The problem, obviously, was the problem of Taiwan. As the People's Republic of China saw it, we had concluded a military alliance with one party to the Chinese civil war. We maintained diplomatic relations with it as the legal Government of all China. And we had stationed military forces on that territory. In their view, all of these things and more had to cease. I say "and more" because the Chinese also insisted that sales of defensive arms to Taiwan must end, and that all the treaties and agreements which had been concluded between the United States and the Republic of China must be abrogated.

In our view, this could not be an acceptable basis for normalization. From the time he took office, President Carter insisted that the terms of normalization must not jeopardize the prosperity or peaceful lives of the 17 million people who live on Taiwan. We had maintained no combat forces on that island since before the end of the Vietnam war and owned no bases there, so that was not a problem. Obviously, in recognizing the People's Republic as the sole legal Government of China we could no longer accord that recognition to the competing claims of the Government in Taipei.

We could agree as well that we would not remain in a formal military alliance with the Government on Taiwan. But we could not agree to end the sale of carefully selected defensive arms, for the three-linked reason: The ending of such sales would have a disastrous psychological effect on Taiwan; we did not wish to see instability created in that region; and, frankly, there is no other nation which is willing to sell modern defensive arms in significant quantity to Taiwan.

We also could not agree to declaring our treaties and agreements with Taiwan null and void. The President had determined that except for the ending of formal diplomatic relations and the Defense Treaty relationship, we would maintain the broad range of substantive ties with Taiwan in commerce and investment, in travel and tourism, and in cultural interchange. These treaties and agreements were exceedingly important to that goal, because without them we could not continue, for example, cooperation in the peaceful uses of atomic energy; and the ending of the Treaty of Friendship, Commerce, and Navigation and the orderly marketing agreements would have a deleterious effect on our and Taiwan's essential business interests.

#### AGREEMENT

In the end, as you know, Peking agreed to normalization even though the United States would continue to supply defensive arms to Taiwan and would not consent to abrogate treaties and agreements. One treaty, the mutual defense treaty would be terminated in accordance with the 1-year-notice provision of article 10. The agreement on status of U.S. forces would also end with the treaty, because its provisions are coterminous with the mutual defense treaty.

The omnibus bill before you now is another essential element in maintaining the broad range of practical relations with the people of Taiwan. I will not recapitulate the section-by-section analysis already provided by Deputy Secretary Christopher. But I do wish to emphasize that by the Presidential memorandum of December 30, 1978, in conjunction with this legislation we will preserve the essential investment and commercial interests of our own and Taiwan's businessmen.

In this connection, I can inform you that the authorities in Taiwan have agreed in principle to establish in the next few days a counterpart to AIT. It will be a nongovernmental body and its officers, for the period of their service with the Council, will not be Government officials.

#### STRATEGIC SITUATION

I would like to turn now to the overall strategic situation in East Asia created as a result of normalization. I think the essential fact here is that for the first time in this century, the United States has a cooperative relationship with the two giants of Asia: Japan, the third economic power of the world, and China, the world's most populous nation. The strategic significance of this is truly enormous, and the conclusion of the Philippine bases agreement in the same month as normalization, means that the U.S. position in East Asia is today stronger than at any time in the past two or three decades. In that vast area where almost half the world's population lives, the United States now has friendly and cooperative relations with all but the countries of Indochina and North Korea.

#### TAIWAN'S SITUATION

I know that Deputy Assistant Secretary of Defense Armacost will testify in a few minutes as to Taiwan's security situation, but I would like to say a few words on this subject as well.

There are many ways in which security can be provided for. A treaty, or a military alliance, is one of them. But in realistic terms, the security of Taiwan and its people has been maintained by a constellation of factors, and not just by one:

① First, by the Sino-Soviet rivalry, and the presence of about 44 Russian divisions along the 4,500-mile frontier with China. The fact is, for many years China's most capable and modern units have been deployed along that same border to face the Russian buildup. Additional units have been recently moved from the Fukien coast opposite Taiwan to the border with Vietnam. USSR

② Second, by the fact that the People's Republic of China is not capable in strictly military terms of mounting a successful invasion across the 100-mile-wide Taiwan Strait. Nor has Peking attempted to acquire the amphibious capabilities that would allow it to contemplate such an invasion. Since 1949, the People's Republic of China has constructed only one LST.

③ Third, by the economic vitality of the people of Taiwan themselves, making that small island a major factor in the world's trade.

④ Fourth, by the military deterrent forces Taiwan itself maintains.

⑤ Fifth, and I believe most important of all, by a cooperative, interdependent relationship between China on the one hand, and the United



States, Japan, and the industrial democracies on the other. For our part, we have made very plain that we retain important interests in the Taiwan region. Good relations between the United States and China are not only in the interest of the people of Taiwan themselves, I firmly believe they are the major factor in promoting their security.

#### KENNEDY-WOLFF RESOLUTION

It is in the light of these factors that I would like to comment on the resolution offered by Chairman Wolff, Senator Kennedy, and others. Inasmuch as this administration sees no threat to Taiwan's security at the present time or for the foreseeable future, strictly speaking we do not consider that the resolution is necessary. On the other hand, if your committee concluded that such a resolution would have a beneficial psychological effect on the people of Taiwan, increasing their confidence in the future, I would certainly be prepared to work closely with you in the shaping of resolution language.

Finally, I would like to say a few words about the future. The report issued by your committee last December was titled "A New Realism" and was based on the appreciation which you and your colleagues, Mr. Chairman, obtained last summer during your very significant conversations with People's Republic of China leaders in Peking as to a peaceful settlement by the parties themselves.

As I stated earlier, we shared your view and your conclusions, and I believe the terms of normalization themselves testify to that realism. I also believe that normalization has greatly increased the possibilities of a peaceful settlement over time by the parties themselves.

#### ADMINISTRATION POSITION

The administration's position is clear and simple. The United States will not propose any solution or attempt to act as arbiter between the two Chinese parties. The United States will not impede any solution to which the parties can agree. But the United States will continue to insist that any solution must be effected by peaceful, noncoercive means only.

I will be pleased to answer to the best of my ability any questions you or your committee may have, Mr. Chairman.

I am accompanied in addition to Mr. Armacost by the Deputy Legal Adviser to the Secretary of State, Mr. Lee Marks, and Mr. Harvey Feldman, who works very closely with me in affairs regarding Taiwan.

Mr. WOLFF. Thank you very much, Mr. Secretary, for a very comprehensive statement. I think we will take the statement from Mr. Armacost and then proceed to questions.

#### STATEMENT OF MICHAEL H. ARMACOST, DEPUTY ASSISTANT SECRETARY OF DEFENSE FOR EAST ASIAN, PACIFIC, AND INTER-AMERICAN AFFAIRS

Mr. ARMACOST. Thank you very much, Mr. Chairman.

I am pleased to participate in the subcommittee's hearings on the normalization of U.S. diplomatic relations with the People's Republic of China and the security of Taiwan. In my statement, allow me to

address some of the questions which I know are of concern to you and your committee.

First, what benefits will the United States obtain as a result of normalization? I will address only the security benefits. Others present can identify the political and economic benefits associated with normalization.

I would begin by noting two important, if self-evident, facts. First, China is an emerging world power which will exercise increasing influence on world events. Second, the People's Republic of China acts as a strategic counterweight to the U.S.S.R. As a result of the deepening Sino-Soviet rivalry, the U.S.S.R. has now deployed 20 to 25 percent of its ground and tactical aviation forces along the Sino-Soviet border. These are important realities; they are not a direct consequence of normalization. But normalization of relations with China enables us to adapt our policies in ways that take them into account. We did not, of course, precipitate the split between Moscow and Peking, and we have no desire to see it intensify. However, the point remains that we have benefited from the split. Specifically, China has, as a consequence, sought to improve its relations with the United States and with many of our Asian friends, while the Soviets now have to plan for what they view as a two-front security problem.

The accompanying change in China's orientation does affect—and improve—our security by relieving us of the requirement we perceived in the past, of confronting two major adversaries on two different fronts. As a result, military resources have been freed for other purposes and we have gained greater global flexibility in our strategic planning. Moreover, Peking, in its desire for expanded ties with the United States, has acquired additional incentives for restraint on the Taiwan issue and for the pursuit of moderate policies elsewhere. For example, the People's Republic now supports a strong NATO, endorses the preservation of the United States-Japanese defense relationship, applauds our presence in the Western Pacific, actively encourages the growing cohesion of ASEAN, and shares our stake in avoiding a renewal of the Korean war. These policies are beneficial to our security and the security of many of our allies.

#### PRC GOALS

To be sure, China's foreign policy goals and actions do not fully coincide with American interests and policies. Nor can we expect the Chinese to forgo their own national interests in pursuit of improved Sino-American relations any more than we are willing to subordinate our interests to theirs. What is significant, however, is the substantial parallelism of United States and Chinese interests which permits us to maintain compatible approaches to many issues around the globe.

Completion of the normalization process serves to reduce the future possibility that we might slip back into a confrontation with the Chinese. It also provides the basis for a further reduction of tensions in the region and lays the groundwork for a major expansion in Sino-American cooperation.

A second frequently asked question is: "Will normalization and the withdrawal of U.S. military forces and installations from Taiwan



adversely affect our military capabilities in East Asia and the Western Pacific?" In general, the answer is no.

As you are aware, our military presence on Taiwan dates from the time when we faced what appeared to be a monolithic Communist threat in Asia and were locked into bitter military confrontation with the PRC. Our presence on Taiwan—and our Mutual Defense Treaty—were part of a larger policy of military containment of communism; our facilities and bases were part of a wider comprehensive regional base structure. Since then, the situation in Asia has changed dramatically and the rationale that led us to establish a military presence on Taiwan is no longer valid.

As a result of the changing situation in Asia, moreover, we have been reducing our military presence on Taiwan for many years. For example, at the time of the Shanghai Communique in 1972, we had 9,500 military personnel on Taiwan. We withdrew our last combat units in 1975. And when the normalization announcement was made on December 15, 1978, there were less than 700 U.S. military personnel on the island.

#### THREATS TO STABILITY

There are, to be sure, residual dangers to peace and stability in the region, not the least of these being the gradually increasing size of Soviet military forces in the area. While increases in Soviet efforts to project power into the Pacific area are primarily a reflection of their growing antagonism toward China, substantial Soviet long-range aviation and naval forces in Asia would pose a significant threat to U.S. and allied interests in the Pacific, if there were any major conventional conflict in the region. The point I wish to emphasize, however, is that U.S. forces on Taiwan would not be well positioned to counter such Soviet forces if the need arose; facilities and forces located elsewhere would be principally farther to the north.

The other major threat in Northeast Asia is, of course, North Korea. But the U.S. forces needed to assist in the defense of the Republic of Korea are either already in South Korea or would be deployed directly to South Korea in the event of an attack. U.S. bases on Taiwan might be useful for logistic support and refueling purposes, but they are certainly not essential for the successful defense of South Korea.

While I am talking about logistics support, let me mention two actions that we are taking to avoid adverse consequences that the removal of U.S. forces and installations from Taiwan could have on our ability to support our forces in the area.

First, those items of war reserve materiel (WRM) which are needed to support contingencies elsewhere in the region, will be withdrawn from Taiwan. We propose to transfer the remainder of our WRM stocks on the island to Taiwan. This, of course, will require congressional authorization, and draft legislation to accomplish this task is being prepared for submission to Congress. If approved, transfer of this portion of our WRM on Taiwan would occur in 1980.

Second, a civilian corporation on Taiwan—Air Asia—currently perform contract maintenance work on our F-4 aircraft. Last year a decision was made to transfer this maintenance work to Korea, where most of our F-4 aircraft are located. This transfer will be completed

by the end of the year; until then, maintenance work will continue to be done on Taiwan.

The third question we are asked is, will the withdrawal of U.S. forces from Taiwan and the termination of the Mutual Defense Treaty increase the likelihood of a PRC attack on Taiwan? Again the answer, I believe, is no. For a variety of reasons, I believe PRC action against Taiwan is extremely unlikely for the foreseeable future.

#### TAIWAN'S DEFENSE

Militarily, China is not at present capable of mounting a successful combined air and sea invasion of Taiwan. Peking is now primarily concerned about the threat from the U.S.S.R., which requires that it maintain large forces along its northern borders. China is also concerned about its border with Vietnam. Any serious PRC effort to mount an invasion of Taiwan would require Peking to seriously weaken these border defenses. Moreover, the PRC lacks the necessary amphibious shipping, as Secretary Holbrooke mentioned, to support such an invasion and could not obtain it before the mid-1980's even if they began a concentrated effort now.

Though Peking could use its air and naval forces to degrade Taiwan's defenses or perhaps blockade the island, such actions would pose prohibitive costs and risks while offering little assurance of success. For example, although China has a large number of combat aircraft, many are obsolescent fighters based on Soviet technology of the early 1950's, which are limited both in range and payload. Few are equipped with air-to-air missiles, and pilot proficiency is well below Taiwan's standards. For its part, Taiwan possesses very impressive defense capabilities of its own. Nor, as the President has stated, can the PRC discount the possibility of a U.S. military response to a Chinese attack on Taiwan.

Beyond these military factors, a wide variety of political constraints further diminish the likelihood of a People's Republic of China attack on Taiwan. China has embarked on a massive effort to modernize its economy. Success in this effort will require the active cooperation of the United States, Japan, and the West in general. An attack on Taiwan would jeopardize—indeed, very probably foreclose or terminate—such cooperation. Similarly, the Chinese are concerned with Moscow's growing influence in Vietnam and elsewhere in East Asia. That concern enhances Peking's stake in cultivating closer state-to-state relations with the ASEAN countries, which remain extremely sensitive to Taiwan's fate. Finally, Peking also must consider the possibility that an attack on Taiwan will evoke Japanese anxieties and precipitate a major re-orientation of Japan's security policies with anti-Chinese overtones.

#### ATTACK UNLIKELY

In short, we believe that a People's Republic of China attack on Taiwan is highly unlikely. Nonetheless, the administration has made clear to Peking's leaders that we will retain a concern for the well-being, prosperity, and security of the people on Taiwan.

A further question we have confronted is, have adequate provisions been made within the framework of our normalization policy for the



future security of the people of Taiwan? The answer, I believe, is that they have.

① First, the United States has publicly expressed its expectation—not its hope but expectation—that the Taiwan issue will be resolved peacefully by the parties directly concerned. This position is clearly known to Peking, and People's Republic of China leaders have agreed not to contradict it.

② Second, in the recent normalization negotiations with the People's Republic of China, we insisted that termination of the Mutual Defense Treaty must be accomplished in accordance with its provisions, rather than abrogated as Peking proposed.

③ Third, despite the People's Republic of China's disagreement, we have indicated that we intend to continue to provide Taiwan access to selected items of defensive arms, as well as follow-on support for weapon systems previously supplied.

*Sale  
weapon* This latter point is of special significance, since Taiwan's ability to maintain modern self-defense forces is of central importance to its security. Over the years, the United States has provided Taiwan the bulk of its defensive equipment through foreign military sales and commercial channels. We will continue to extend such access.

All arms we have agreed to sell to Taiwan, and which are now in the pipeline—and these amount to more than \$850 million—will be delivered.

We are completing processing formalities, to include the requisite notification of Congress, for the sale to Taiwan of those major items of military equipment approved late in 1978, including 48 additional F-5E interceptors with improved weaponry such as precision guided munitions and Maverick missiles.

Beginning in 1980, we will resume sales of selected defensive arms to Taiwan, taking into account the situation in the Taiwan Straits.

Finally, some have asked whether Sino-United States normalization might prompt Taiwan to exercise a Soviet or nuclear option? Since adequate provisions have been made for Taiwan's future security—as noted earlier—we believe the answer to this question is now.

We believe that it is extremely improbable that Taiwan would turn to the U.S.S.R. as a result of normalization—especially since we will continue to sell them military equipment and maintain extensive cultural and commercial relations. Moreover, the probability of a People's Republic of China attack on Taiwan is extremely low—we know that and Taiwan knows that—hence there is no need for Taiwan to seek a close relationship with some other protector like Moscow. I can think of no step more likely to invite—rather than deter—People's Republic of China military pressures against Taiwan than a turn to Moscow.

#### TAIWAN OPTIONS

I need hardly add the potential consequences of such a move for Taiwan's economic situation given its dependence on access to the West for markets and investments. Taiwan's leaders, including President Chiang Ching-kuo himself, obviously understand these considerations since they have repeatedly and publicly stated that they have no intention of exploring the Soviet option. In short, I believe we can

safely discount the possibility of Soviet military bases appearing on Taiwan once we withdraw our forces.

Similarly, although Taiwan has the scientific sophistication, the technology, and the materials necessary to fabricate nuclear weapons, authorities on Taiwan have assured us that they have no intention of developing such weapons. Moreover, since 1972 inspections of Taiwan's nuclear power facilities have been made through a special three-way arrangement between the International Atomic Energy Agency, Taiwan, and the United States which is the source of most of Taiwan's nuclear material. This arrangement is not affected by the termination of diplomatic relations between the United States and Taiwan. Finally, Taiwan is well aware of United States concerns and interests in this area, and understands that not only would production of nuclear weapons jeopardize its continued fuel supply from the United States, but would also force the United States to reassess its intent to continue to sell defensive arms to Taiwan.

Mr. Chairman, that completes my statement. I will be happy to answer questions that your committee may have.

Mr. WOLFF. Thank you. We will operate under the 5-minute rule here so that all colleagues will get an opportunity to ask questions.

I should like to ask one question. As I understand it, when you mentioned Taiwan now, according to the new phraseology, or diplomatic language, it refers to the people of Taiwan; am I correct in that?

Mr. ARMACOST. Yes.

Mr. WOLFF. During the course of events here you have mentioned Taiwan. We have been confused in this committee as to what Taiwan really is, so that we, I think, have to limit it now to the question of people on Taiwan. Getting back to your statement, Mr. Holbrooke, could you tell us since Mr. Armacost has made a statement that the President is not restricted from taking military action if he decides that it is in the best interests of our country, are there any restraints that you see currently to the President taking any military action that he thinks is necessary?

Mr. HOLBROOKE. When you say "currently" you mean at this moment or after the—

Mr. WOLFF. At this moment or even after the Mutual Defense Treaty has ceased to exist?

#### U.S. DEFENSE OPTIONS

Mr. HOLBROOKE. I think, as the President made clear in his press statements last Friday, Mr. Chairman, he would act in accordance with the national interest and in accordance with the proper congressional consultative requirements.

Mr. WOLFF. There are no restraints you know of other than the war powers resolution, I take it, that would act upon him to restrain him from any activity in responding to a threat to the security of Taiwan?

Mr. HOLBROOKE. I do not believe that the President is under any restraints other than those that exist in regard to the Presidential authority on a global basis in regard to that area.

I would stress the high importance that the President and this administration attach to the question of peace and stability in the east Asian region.



## KENNEDY-WOLFF

Mr. WOLFF. You have seen the resolution that about 100 Members here have offered? I take it that you don't feel that our resolution has gone further than what presently exists, what we presently have in existing law, even after the treaty has been concluded? Am I correct?

Mr. HOLBROOKE. Are you referring to House Joint Resolution 167?

Mr. WOLFF. Yes; I am. I know you said we don't need it. By the same token, I just want to attempt to reinforce some elements of what we are trying to establish.

Mr. HOLBROOKE. Let me make clear that, as the President has said, we believe that the negotiating history makes an additional resolution unnecessary in the strict sense. We believe that the negotiations and the situation between us and the People's Republic of China are such that the peaceful settlement of the Taiwan question has in fact been enhanced by normalization. However, if the Congress does believe that further reassurance is necessary and if the Congress wishes to make its own voice felt in this matter, which is, of course, the prerogative of the legislative branch, which I do not remotely question, the administration would not oppose a resolution along these lines. I do not see in House Joint Resolution 167 anything basically inconsistent with our agreement with the People's Republic of China on normalization.

Mr. WOLFF. There are a number of questions that I and other members of this committee will have. Because of time constraints we will not be able to ask all of the questions. I would like to ask unanimous consent that all members have the opportunity of submitting questions in writing to the administration, the Secretary of State, and the Secretary of Defense, for written answers.

If there is no objection to that, so moved.

Mr. Secretary, we do not find in this omnibus legislation any provision to protect the people on Taiwan against economic boycotts by the People's Republic of China involving U.S. companies.

How is that handled with this legislation?

Mr. HOLBROOKE. May I ask the deputy legal adviser, Mr. Marks, to address that question?

Mr. MARKS. Mr. Chairman, first, we have no reason to believe that the People's Republic of China would attempt such an action, but under both the Presidential memorandum of December 30, 1978, and the omnibus legislation, the antiboycott laws of the United States would continue to apply in regard to Taiwan.

## "PEOPLE ON TAIWAN" DEFINED

Mr. WOLFF. Could you give us a definition of what you mean by people on Taiwan?

Mr. MARKS. Yes; the people on Taiwan as used in the omnibus legislation refers both to the geographic location of Taiwan, to the population of Taiwan, and to the authorities on Taiwan.

Mr. WOLFF. The authorities by whose determination? In other words, could a free Taiwan organization become the authorities on Taiwan?

Mr. MARKS. By whatever means and whatever ways the Taiwan authorities are chosen.

Mr. WOLFF. Well, suppose they themselves chose to become the authorities?

Mr. MARKS. I am not sure I understand your question.

Mr. WOLFF. Who determines who the authorities on Taiwan are?

Mr. MARKS. The people on Taiwan. That is, the same people, the same authorities that existed before December 15.

Mr. WOLFF. Does that mean that there could be an election on Taiwan?

Mr. HOLBROOKE. Mr. Chairman, I think you are referring to a situation which we both understand is being very hypothetical and I would prefer not to address each possible contingency. For the purposes that we are now dealing—

Mr. WOLFF. Mr. Secretary, with all due respect, we are faced with many hypothetical situations as a result of the omnibus legislation that is before us. What we are trying to do is to make that omnibus legislation, which is very hypothetical and very broad, fit into some area that can be specific.

#### TAIWAN'S STATUS

Mr. HOLBROOKE. I think we have been very clear on two different issues, which I think are important to separate. By the people on Taiwan, we refer to the 17 million people on the island, including the authorities who are in charge of the affairs of that island, and we will deal with them through the instrumentalities which we have previously discussed.

In regard to the question of the status of Taiwan, we have recognized the Government in Peking as the sole Government of China and we have acknowledged the Chinese position that there is one China and Taiwan is a part of it. That position cannot change, Mr. Chairman. To question that position would be to bring into question the very basis of the normalization arrangements between the United States and the People's Republic of China.

Mr. WOLFF. We are not questioning normalization, what we are questioning now is which law prevails, what law prevails, how do we act in the future? You have a broad, ambiguous designation, "the people of Taiwan." We as a nation, our business community, no one can deal with 17 million people. You say we can deal with the people on Taiwan and the authorities. Now how is that narrowed down?

Mr. HOLBROOKE. I quite accept your point but I want to stress that dealing with the people or the authorities on Taiwan, if you will, for purposes of unofficial, nongovernmental, people-to-people relations in the field of trade, exchanges, travel, and so on, will continue through the instrumentalities of the system whose authority and approval we are seeking from you today.

The question of recognition has been clearly stated and will not change. We recognize Peking, and I do not think that anything that might happen on the island of Taiwan at some future day would change the basic decision that we have made to recognize Peking as the sole Government of China and to acknowledge the Chinese position that there is but one China and Taiwan is a part of it. So while I think you are addressing a question of great importance, both historically and prospectively in the future, I do want to stress that our position on this question of recognition would not change regardless



of whatever contingencies or hypotheses are subsumed under your question.

Mr. WOLFF. Mr. Secretary, I appreciate all the effort and work you have done to bring about the normalization process, and I think you have done an outstanding job, there is no question of that, but I think that you must have had George Orwell on your staff, because it seems to me we are doublespeaking in this situation. I think this is one of the big problems we face in trying to narrow down the very important elements that are involved.

My time has expired.

#### CLARIFYING TAIWAN'S STATUS

Mr. HOLBROOKE. Mr. Chairman, Mr. Guyer, may I just clarify the question of the status of Taiwan? Would that be acceptable to you?

The situation is unique in regard to Taiwan. We have acknowledged the Chinese position that Taiwan is part of China. Simultaneously, the joint communique on the establishment of diplomatic relations with the People's Republic of China states that we will conduct commercial, cultural, and other relations with the people on Taiwan on an unofficial basis. There is no precedent for this particular situation in American international law nor do conventional international law labels cover it. But we are satisfied it solves all our practical relationships. One thing I think it also does, Mr. Chairman, it removes the question of recognition of any claim by the authorities in Taipei now or in the future.

At this time those authorities still maintain that they are the government of China. We no longer accept that claim, after having accepted it since 1949 until January 1 of this year. Now, you have raised an important hypothetical question as to the future, and I would state to you that the position I put forward would apply equally under those circumstances. I do not believe that it is a question of Orwellian doublespeak but rather an extremely sophisticated arrangement to allow the practical day-to-day relationships with the people of Taiwan to continue regardless of what claims for authority are put forward by those authorities.

Mr. WOLFF. My time has expired and we can't engage in further colloquy for which you are very fortunate.

Mr. HOLBROOKE. This is the first time you have given me the last word. [Laughter.]

#### FINAL AGREEMENT

Mr. GUYER. I appreciate the enormity of the subject matter and the intimacy of our hearings. I am curious about a couple of things. No. 1, at what date was an agreement made between China and America on this subject? Was that not made some 6 months ago?

Mr. HOLBROOKE. On normalization?

Mr. GUYER. Yes, sir.

Mr. HOLBROOKE. No, sir, the agreement was announced on December 15.

Mr. GUYER. I know when it was announced. When was the agreement made?

Mr. HOLBROOKE. As a person who participated in every inch of the negotiations from their inception to the announcement, I can tell you

categorically that the decision to make that announcement and what it would contain was made no more than 36 hours preceding the announcement.

Mr. GUYER. My understanding is there was a mental agreement made some 6 months before the announcement?

Mr. HOLBROOKE. That is not correct, Congressman.

Mr. GUYER. Well, at any rate—I can't do any mindreading, but I have reason to believe that the groundwork and the understanding was all made even before our subcommittee went to China.

Mr. HOLBROOKE. That is not correct, Congressman.

#### NO CONSULTATION

Mr. GUYER. I will talk to you another time about that. Let me say this. To the best of my understanding, the chairman of our full committee, the chairman of this subcommittee, and the ranking members of the full committee—Mr. Zablocki, Mr. Wolff, and Mr. Broomfield—did not have any knowledge until what, 2 hours before the announcement, is that correct?

Mr. WOLFF. Two to three hours.

Mr. GUYER. This does not portend to me the kind of congressional-executive companionship we were told, particularly when the President said during the campaign time there would be no secret deals made and it would be a working relationship between the Congress and the White House.

I don't intend for you to defend that.

Let me go back to just two things because time is running out. On page 4 you said that the President's statement guaranteeing Taiwan's so-called safety, security, and peace was made. Can you tell me at what point either in writing or verbally the Vice Premier made that assurance? I listened to everything he said while he was here, I could have missed something, I do not remember his saying at any time Taiwan could enjoy safety, security, and peace, or they would not resort to other measures, if necessary. I would like to know in writing at what point this was secured, your statement on page 4.

#### KEY TO AGREEMENT

Mr. HOLBROOKE. Congressman Guyer, the entire dialog between the United States and the People's Republic going back to 1955 has revolved more around this issue than all the other issues combined. The President would not have made normalization of relations a fact unless he was convinced, on the basis of private and public statements, plus an assessment of the situation, that in fact he was enhancing the chances of peaceful settlement.

Mr. GUYER. We agree on the objective.

Mr. HOLBROOKE. The Chinese will not make, as Deng Xiaoping made clear to you—I believe it was in this room 2 weeks ago—the Chinese will not make an explicit formal statement renouncing the use of force. We do not believe this is necessary.

Mr. GUYER. He was asked repeatedly in every meeting we attended and not until he went back home did he say he would not rule out the use of force, if necessary. So this is contradictory to that so-called feeling of warmth, security, safety, trade.



Let me move—

Mr. HOLBROOKE. Mr. Guyer, may I just complete the answer because I would like the record to reflect clearly what he did say, in addition to what he did not say.

He stated publicly, before your colleagues, before the Senate, and before Congressmen visiting Peking, that if Taiwan recognized PRC sovereignty, "the social system on Taiwan will be decided by the people of Taiwan. Change might take 100 years or 1,000 years. We will not change the society by force."

I believe that goes very far in the direction you have cited. In addition, I would cite the most important single fact about this issue to my mind, which is that as Deng Xiaoping made clear repeatedly during his visit to the States, that China has opted for a major program of modernization involving essential access to American, Western, and Japanese technology, and financing and investment capital. By choosing modernization they have in effect signaled that they are no longer interested in making the Taiwan issue an issue because—

Mr. GUYER. I agree, I think I got more answer than I asked for. At any rate, I have the feeling that China was so desperate in wanting the things that you have outlined that we could have gotten that without the price we paid to get it. That is my personal feeling.

On page 6, you made a statement—I would like the chairman, Mr. Wolff, to just listen. I would like for you to answer this. On page 8 the Secretary said, the U.S. position in East Asia today is stronger than at any time in the past two or three decades. Do you agree with that?

#### U.S. POSITION IN ASIA

Mr. WOLFF. I do think, if the gentleman will yield, that the U.S. position today in Asia certainly has been strengthened as a result of our end of the Vietnam war and the fact that there is peace in the area. However, I do feel there are some very serious questions about our continuing presence and effect of our presence in the area.

Mr. GUYER. I only say this: We are not going to solve the Taiwan issue here in 5 minutes, but I do think that the bold, unannounced, unconfirmed, and discussed result of the announcement, the way it came, is tantamount only to the way the Panamanian Treaties were made after 1 day of recess of Congress; further, Congress was not consulted, the leaders were not consulted, and I have reason to believe from little visitings I have made the credibility of our country certainly has been jeopardized by an instance, I think the only one precedent in American history, by the way and day it was made.

I am not disputing the overall results or the down-the-path benefits, but I am saying it does place us in a very negative diplomatic situation when our work, our integrity, is now being questioned around the world.

Mr. WOLFF. The gentleman's time has expired. We will take questions from Mr. Diggs. After Mr. Diggs' questions, we will recess, as we have previously determined, to make the announcement regarding the MIA's. We will recess for 10 minutes.

Mr. DIGGS. I reserve my time.

Mr. WOLFF. Mr. Solarz.

Mr. SOLARZ. Do you have 5 minutes now?

Mr. WOLFF. Yes.

Mr. SOLARZ. Thank you, Mr. Chairman.

#### ADVANTAGES TO UNITED STATES FROM NORMALIZATION

Mr. Secretary, I wonder if you could perhaps give us a more precise indication than you have in your testimony of the concrete advantages to our country of normalization with the People's Republic of China, in the light of the fact that prior to normalization we did through our liaison office in Peking have some diplomatic contacts with them, so that no one could say that we had no communication with one-quarter of the world's population? We did have cultural and commercial relations of a sort with them, so it wasn't as if we were cut off from trade with them. And there is the fact that normalization did require a termination of the mutual defense treaty, which at least to the people of Taiwan was a source of psychological and perhaps military sustenance as well.

Let me just say or conclude this rather rambling question by saying that the comments that both you and Secretary Armacost made about the strategic consequences of the Sino-Soviet split would presumably be equally applicable even if there were not normalization of relations between ourselves and the People's Republic of China, because that split in the Communist world derives from factors that are fundamentally unrelated to the bilateral relationship between Washington and Peking.

So given all of these considerations, what are the concrete advantages of normalization that justify the price of terminating a long-standing mutual defense treaty and diplomatic relations with Taiwan?

Mr. HOLBROOKE. Mr. Solarz, you asked a difficult question but one that is central to why the President decided he should normalize.

I would answer by dividing the answer into at least two parts. First, the negative consequences of not normalizing and, second, the prospective gains over a long period of time of normalization. First, on the negative side. I would assert very firmly, that the failure to move forward on normalization, a failure to attempt to normalize relations, would have caused the United States-Chinese relationship actually to be set back.

Now, when the President reached that same conclusion, early in 1977, a conclusion he made very clear to the public, he did not know at that time if normalization was achievable. He authorized Secretary Vance, Dr. Brzezinski and Ambassador Woodcock to begin to discuss normalization with the Chinese in a serious and sincere manner, not knowing whether it was possible. We were convinced that not to move forward would be to move back. I note that this subcommittee reached a very similar conclusion in its report last year.

Now, you refer to the strategic advantages and their not changing whether we have normalization or not. I believe in the short term that is correct. In the long term one might argue that normalization significantly reduces the chances of losing the advantages that were outlined by Mr. Armacost in his statement.

It seems to me that we went through distinct phases in our relations with mainland China, as it used to be called by everyone between 1949



and 1978. In the first phase, from 1949 to 1971, there was no relationship at all. In the next 6 years we had limited relationships. While it is true that there was trade and it is true trade was increasing, and while it is true there was communication, there were very serious legal, economic, political, psychological, and historical constraints on the relationship, all of which are now in the process of being removed.

I think that the events in the bilateral relationship between Washington and Peking since normalization have demonstrated how rapidly both sides will be able to explore new possibilities.

#### TRADE RESTRICTIONS PRENORMALIZATION

Mr. SOLARZ. Can you elaborate in more specific terms on what precisely were these legal and other constraints on the improvement of our relationship?

Mr. HOLBROOKE. Some of the most obvious are in the field of trade. The claims-assets issue, which has plagued us since 1950 and had become a more and more serious constraint on trade, was really not being resolved until normalization. We now have asked Secretary Blumenthal to address the issue on an urgent basis in his trip to Peking the week after next.

The Chinese made clear repeatedly that in the absence of normalization they would prefer to buy things from other countries rather than the United States, if they could get a comparable arrangement from someone else. That constraint has been removed.

Mr. WOLFF. Time has expired. You may finish your answer.

Mr. HOLBROOKE. In the field of frank dialog between the two nations on political matters, there were clear inhibitions throughout and our discussions with the Chinese since normalization have shown a significant change in the tenor, they are much franker now, they are much easier. There will be a vast increase in exchanges involving businessmen, students, science, and technology.

Let me conclude, Mr. Solarz, by stressing what I think the real gain of this is to the United States.

#### REAL GAIN TO UNITED STATES

China is a country with many years to go before it catches up with the modern industrialized countries of the world. We all recognize that. As it does, this massive and historic modernization effort, an effort whose outcome is clearly not foreordained and could proceed in a number of ways, it is very much in the interest of our Nation that the Chinese modernization effort be tied as closely as is feasible to the economies and societies of Japan and the West.

Normalization has made that far more possible than would otherwise have been the case. I believe that whatever the future course of China's foreign policy, the fact that the modernization effort is now beginning and will require such a degree of Western and Japanese assistance, is in itself a major plus for the nations of the world who share our values and our systems. I think that whatever the future course of China's foreign policy, the deep involvement they will have with us will be a hedge against the kind of reversion to another foreign policy tendency which could act against our interests.

I would cite that as the most important long-range and tangible gain.

Mr. WOLFF. Time has expired and the committee will stand in recess for 10 minutes for an important national announcement.

[A brief recess was taken.]

#### RESOLUTION ON PAKISTAN

Mr. WOLFF. The subcommittee will come forward.

The Chair recognizes Mr. Goodling.

Mr. GOODLING. Mr. Chairman, I would ask that we might proceed out of order for a few minutes.

Mr. WOLFF. Without objection.

Mr. GOODLING. I would like to have the support of this subcommittee in cosponsoring a resolution that we might be able to present to the Congress tomorrow on a unanimous consent basis, and the resolution would say the following:

Whereas the people of the United States and the people of Pakistan have had long, friendly and mutual beneficial relations;

And whereas, the continued development and prosperity of Pakistan is important to the people of Pakistan, Pakistan's friends in the United States, and the peace of the world, and,

Whereas, the judicial proceedings in the case of former Prime Minister Bhutto have led to a sentence of death, implementation of which might well precipitate unnecessary confrontation between the supporters of Mr. Bhutto and the government of Pakistan. Now, therefore, be it

*Resolved by the House of Representatives of the United States of America in Congress assembled,*

That it is the sense of the House of Representatives that the President of the United States should convey immediately and in the most urgent possible terms the friendly concern of this body about the possible execution of former Prime Minister Bhutto, and

That a demonstration of clemency by the President of Pakistan and in commuting Mr. Bhutto's death sentence would be a statesmanlike and humane gesture.

Mr. GUYER. I think the sequence here is a little bit already out of date because the President has already acted. What you might say is to have this rephrased to support the President because he has already made his appeal of clemency. It would make your language come up to date.

Mr. GOODLING. We can rephrase that.

Mr. WOLFF. I would suggest that the gentleman rephrase it. I will be happy to support it personally, and I think that we should take this to the individual members since the committee will not be able to act in time.

Mr. GOODLING. Yes.

Mr. GUYER. Could we not, Mr. Chairman, if I might, with the reservation of bringing the language up to date, take action as a subcommittee even now?

Mr. WOLFF. If the gentleman moves in that direction.

Mr. GUYER. I so move that the language be brought into conformity supporting the President's action and showing our concern and appeal in the same direction, and have the staff draft such a statement, and I so move now.

Mr. GOODLING. I will second it.



Mr. SOLARZ. I am sure this is an entirely meritorious recommendation. If the subcommittee is being asked to vote on this, I just came in. Could you or Mr. Guyer just briefly indicate what the recommendation is?

Mr. GOODLING. I gave you a copy, Mr. Solarz.

Mr. SOLARZ. All right.

Mr. GOODLING. It merely mentions we should bring it up to the committee as support of the President in this regard.

Mr. WOLFF. The question is before the committee. Is there a second?

Mr. GOODLING. I second.

Mr. WOLFF. On the question, would anyone like to speak on this? I might just advise the subcommittee that several months ago the subcommittee made such an appeal directly to the Government of Pakistan on the same subject.

Mr. SOLARZ. This resolution, Mr. Chairman, I gather does not in any way express a judgment on the part of the Congress as to whether or not Mr. Bhutto was guilty as charged, but is simply an expression of hope that his sentence of death will not be carried out?

Mr. WOLFF. As I understand the resolution of the gentleman from Pennsylvania, that the resolution is based upon an appeal for clemency, and that is all.

Mr. GOODLING. Yes; the last line would indicate that.

Mr. WOLFF. Any further discussion?

If not, I will put the question. All in favor say "aye."

[Chorus of "ayes."]

Mr. WOLFF. Opposed?

[No response.]

Mr. WOLFF. Since it is the wish of the subcommittee that this resolution be passed on, I take it, Mr. Goodling, you would like this resolution passed on to the full committee?

Mr. GOODLING. Yes.

Mr. WOLFF. So ordered.

Mr. Pritchard.

#### RESOLUTION OF TAIWAN QUESTION

Mr. PRITCHARD. Thank you, Mr. Chairman.

Mr. Secretary, we continually stress that the resolution of the differences between Taiwan and the mainland should be worked out peacefully. This presupposes there has to be a resolution and that eventually these two nations will have to get together. Is that our official position?

Mr. HOLBROOKE. Mr. Pritchard, I do want to stress that that is not at all what I meant and, in fact, I tried to make clear at the end of my statement that is not our position. We are not going to propose a solution on the Taiwan question.

We have no further position on when or how this should happen. Our only interest is if it happens, it happened peacefully. I cannot stress too strongly the importance of this point. For over 30 years, the United States was an active participant in the Chinese civil war. By the act of normalization, we are no longer involved; our interests are only that the solution, if and when it takes place, be peaceful. Speaking for myself, I have no problems with seeing the present situation

on Taiwan and the mainland continue indefinitely, and generally I would draw your attention to Vice Premier Deng, when he stressed remarks by Chou En-lai and Chairman Mao and other Chinese leaders, they are willing to see the present situation in Taiwan last for 100 years.

Mr. PRITCHARD. He didn't give us that impression when we asked him when he was here.

Mr. HOLBROOKE. He stressed the fact they are willing to see the present social, political situation on Taiwan last indefinitely.

#### DANGER OF BLOCKADE

Mr. PRITCHARD. It seems to me the testimony is accurate on their ability militarily to swallow up the island. The greater danger is blockade and the deterrence to that blockade.

What would be our response?

Mr. HOLBROOKE. First of all, Mr. Pritchard, I do not believe a blockade is likely. In fact, I consider the Chinese do not have the capability nor do they have any political incentive.

Mr. PRITCHARD. I believe they have the capability, Mr. Secretary, with 56 submarines. You don't have to notify many foreign countries their ships are in danger.

Mr. HOLBROOKE. I see absolutely no possibility that the Chinese would use their very limited naval and submarine capability in this regard under any conceivable present contingencies, provided the present foreign policy orientation of the authorities on Taiwan remain unchanged. That is a very important point.

#### RISKS OF BLOCKADE FOR PRC

Mr. ARMACOST. May I add a point, namely, most of the commerce to and from Taiwan is carried in the ships bearing other flags; therefore, a blockade would constitute an assault on many other nations; the interests of most every maritime nation in the world would be engaged.

Mr. PRITCHARD. I am aware of that. The problem here is one of perception, because if you go to Taiwan and you talk to the business people, as we did, about 4 weeks ago, the perception on Taiwan is totally different from what you are saying here. What you say may be true. My point is that if the perception is otherwise, it has a very negative effect. I think you recognize it is important that the perception in Taiwan and around the world is of a stable, strong island, and that they are going to be there for quite a while. Because if they aren't, people are going to be taking their money out; and if you have that flight of capital, they are in serious trouble.

Mr. HOLBROOKE. I am glad you raised the point. I wonder if I could comment about it in specific relation to the trip you and Chairman Wolff made about 4 weeks ago?

It is my frank view that the Taiwan authorities are quite aware of the same points that we have made, but it is their interest to maximize their concern when talking to a congressional delegation. You or I would do the same thing in their place.

Mr. PRITCHARD. Yes; businessmen, some of whom I know personally, were very upset and had serious doubts.



Mr. HOLBROOKE. There has been little effect on the stock exchange on Taiwan, and no adverse effect on the economic situation.

Mr. PRITCHARD. There has been some. I would agree with you it is really too early to make that judgment.

Is the Chinese leadership clearly aware that if they set out some blockade, or if they make some strong moves, they will lose all they have gained, and probably lose recognition?

Mr. HOLBROOKE. I think there is no point which is clearer to the leadership of the People's Republic of China than that one. It has been made clear not only by the President personally and by his negotiators, but it has been made clear also by the House and Senate of the United States, and I don't think there is the slightest misunderstanding about it.

Mr. PRITCHARD. I think that has to be stated clearly and publicly to the people of Taiwan, because I think that is their strongest defense.

Mr. HOLBROOKE. Mr. Pritchard, I agree with you and I accept your point. If I might just make two additional comments for your record, which I think is an important part of the proceedings leading to normalization.

First, one of the clearest signals to both Peking and Taipei of what we intend would be the prompt passage of this bill. So I would urge you to consider that that is the most important actual event because it permits us to continue our relations with the people of Taiwan unimpeded, and if there is a delay I think it could be very serious.

#### TAIWAN BUSINESS CONTINUES

Second, in regard to U.S. business dealings with Taiwan since normalization, I received only last night telegrams from our Embassy in Taipei saying that since normalization there have been several major deals, an \$80 million Bank of America loan, at one-half percent over the U.S. prime; a Canadian bank loan of about \$50 million to Tai Power; an \$80 million loan to China Petroleum by a number of large Texas banks. The Taiwan authorities themselves expect more capital to come in. There has been no significant adverse economic effect nor should there be. Taiwan is now one of the eight largest trading partners of the United States. We assume that the growth rate in United States-Taiwan trade will be very impressive this year, as it was last.

We hope this is in fact the case.

Mr. PRITCHARD. Thank you.

Mr. WOLFF. Time has expired.

Mr. Mica.

Mr. MICA. I will pass at this time.

Mr. WOLFF. Mr. Hall.

#### PEOPLE'S REPUBLIC OF CHINA GAINS

Mr. HALL. Mr. Secretary, what does the PRC gain from normalization with the United States other than really the obvious; that is, the high technology and moving their country into the modern age?

Mr. HOLBROOKE. The People's Republic of China's gain, Mr. Hall, is very clear. They have gotten an explicit statement from the United States that we recognize that they are the legitimate Government of China. I think that transcends all other gains in their mind. They have also gotten that recognition from probably the last major power in the

world, with the exception of Saudi Arabia which does not recognize them. They also would see some strategic gains for themselves, more psychological than real in nature, but psychological factors are important.

They have improved their access to American markets, and they clearly feel, I think with reason, that American public opinion is becoming increasingly favorable to them.

Mr. HALL. What about the reaction within the country of mainland China in regard to the internal conflicts of the purest of all Chinese doctrines, the revolutions in the past, their complete opposition to any modernization of their country, the closing of the borders, many different political facts, and yet they seem to speak as one country.

Are there any internal problems that you see?

Mr. HOLBROOKE. I am not sure I follow the thrust of your question with regard to normalization. China has gone through remarkable internal changes and stresses and struggles for leadership in the last few years. I am not the best person to comment on those. I think it would be inappropriate for me to make observations, given the job I now hold.

It is our view, and one that Vice Premier Deng stressed during his trip here, that the two or three major themes of the People's Republic of China that Deng Xiaoping gave us during his trip are ones that are supported by a unified leadership. We are—and I want to stress this—not recognizing an individual man, we are not recognizing a clique within a government, we are recognizing and dealing with the leadership of a country across the board.

That may not address your full concern. If it didn't I am sorry.

#### INTERNAL CHANGE DOUBTED

Mr. HALL. I guess I go back a few years to the teachings of a very, very strict Chinese doctrine, the teachings of what China has been all about for the past 30 or 40 years, and I find I understand what the advantages are to the country, not only to the People's Republic of China but to us, but I just kind of find it hard to believe that there has been a complete change not only in the doctrine but in the minds of the Chinese to move into the 20th century.

Mr. HOLBROOKE. Mr. Hall, I would certainly share what I take as one of the thrusts of your questions, which is that we must recognize the vast differences between China and the United States, different social systems, different values. Those are not going to disappear overnight. I think they will continue regardless of what happens to the political leadership in Peking because some of those are inherent in the different cultures and societies of the two countries. But I do think that events in recent months have been favorable to our own U.S. national and strategic interests, and I refer to internal developments in China as well as external changes in Chinese foreign policy, such as the Sino-Japanese Friendship Treaty and the improving Chinese relations with countries of the Association of Southeast Asian Nations.

#### KOREAN QUESTIONS

Mr. HALL. With regard to the last statement, are we using our influence now? Was the question of North Korea and South Korea discussed with the Deputy Prime Minister?



Mr. HOLBROOKE. Yes.

Mr. HALL. Are we exerting pressure or influence?

Mr. HOLBROOKE. The Korean question was an important topic during the visit of Vice Premier Deng to Washington. The President made clear our belief that any talks between North Korea and South Korea should be between the responsible authorities of the two halves of Korea. The Chinese made clear their strong support for the position of the DPRK, that is, North Korea. Both sides recognized that there was a difference of opinion here and I think this was an encouraging sign. Both sides stressed their strong belief that the issues in Korea must be dealt with in a very peaceful fashion.

That may seem like rhetoric, but it was an important stress, and I would draw your attention also to the stress that Deng Xiaoping gave this issue in his public comments to the House and Senate. We are further encouraged by the recent events, recent statements by Kim Il-Sung and Seoul which open up the distinct possibility of some form of dialog between North and South Korea in the very near future.

Mr. HALL. Thank you.

Mr. WOLFF. You have time for another question.

#### PRE-VIETNAM SITUATION

Mr. HALL. I apologize, Mr. Chairman, if this was discussed yesterday, but I was stranded in my district and could not get into the National Airport. The other question was in regard to whatever influence we are using with regard to the People's Republic of China and the Vietnam-China situation and a possible eruption of fighting or conflict there.

What are we doing with regard to that situation?

Mr. HOLBROOKE. We are extremely concerned with this situation. We have made our concerns known directly to all the parties in the region, China, Vietnam, the Soviet Union, our close friends in ASEAN, particularly Thailand, whose Prime Minister visited us last week. Our objective is to encourage a stable system of independent nation states in Southeast Asia.

In our view that includes not only the five states of ASEAN, but it also includes an independent Cambodia, or Kampuchea. We have strongly condemned and would continue to condemn the human rights abuses of the Pol Pot government which to our mind was probably the worst human rights violator in the world. We cannot, however, condone the invasion of Cambodia by the Vietnamese and, that is in fact, without any question, what took place in January.

That was not an indigenous uprising. We have made this position clear and in the United Nations we supported the nonaligned movement resolution which passed 13 to 2 but was vetoed by the Soviet Union. We are ready to continue to work with other countries, including the nonaligned countries, ASEAN, Japan, China, to make clear our strong opposition to the Vietnamese invasion and occupation of Cambodia.

In regard to the situation between China and Vietnam, on which we issued a statement over the weekend, we would view with concern anything which increased the tension in the area or threatened to disrupt the extremely important and promising developments in ASEAN over the last 2 years.

Mr. HALL. Mr. Chairman, Mr. Secretary, how much do those statements really mean?

Mr. HOLBROOKE. The public statements are on the visible part of the iceberg. We are working actively through diplomatic channels and we are working with many other countries. I would mislead you if I were to say that statements and diplomatic efforts can automatically in and of themselves prevent escalation of tensions into violence. However, I do believe that all the countries concerned in this situation, which I consider extremely delicate, are on notice as to the concerns not only of the United States, which I believe has a genuine role of moral leadership in the world, and one we should exercise in this case, and in this case we are exercising, but also many other countries, including leaders of the nonaligned movement who spoke out vigorously in the United Nations and elsewhere. I would point to Romania and Yugoslavia and others in that regard, and also Japan and all the countries of ASEAN.

What will happen is very hard to forecast, but I think that whatever happens the United States is, as it should be, taking a very strong stand on these issues.

Mr. WOLFF. The gentleman's time has expired.

Without objection, there are two papers I should like to insert in the record at this point. One is from the Assistant Secretary of State for Congressional Relations, Douglas Bennet, regarding the history of negotiations leading to normalization between the United States and the People's Republic of China.

Second is a paper entitled, "The Separation of Powers and Termination of Treaties: Constitutional Implications of Termination of the Mutual Defense Treaty Between the United States and the Republic of China (Taiwan) and Recognition of the People's Republic of China."

This report was prepared at our request by Jonathan B. Eddison of the Georgetown University Law Center. The subcommittee would like to thank Mr. Eddison for his thorough work.

Without objection, these will be placed in the record at this point. [The papers referred to follow:]

"HISTORY OF NEGOTIATIONS LEADING TO NORMALIZATION OF RELATIONS BETWEEN THE UNITED STATES AND THE PEOPLE'S REPUBLIC OF CHINA," BY DOUGLAS J. BENNET, JR., ASSISTANT SECRETARY FOR CONGRESSIONAL RELATIONS, DEPARTMENT OF STATE

When the Carter Administration took office in January 1977, in the absence of diplomatic relations between the United States and China, the February 1972 Shanghai Communiqué formed the basis for the relationship between the United States and the People's Republic of China. Shortly after taking office, President Carter publicly reaffirmed the validity of that document, including its commitment to seek normalization of relations.

In August 1977, Secretary of State Cyrus Vance went to Peking with instructions from the President to conduct exploratory talks on global and bilateral matters. During those talks, the two sides found many points of common interest from a global point of view. These reinforced the strategic view that a strong, secure, and peaceful China was in the interests of peace in the world.

Secretary Vance also discussed many of the central issues pertaining to normalization, and each side emerged with a clearer view of the concerns of the other.

Following the Secretary's return to Washington the State Department began to examine the legal and constitutional implications of normalization, with a particular view to the kind of representation structure that might be established



in Taiwan following establishment of diplomatic relations with the People's Republic of China. A principal concern was preservation of our ability to maintain the full range of commercial, cultural, and other unofficial contacts between the people of the United States and those on Taiwan. We needed to be sure that an unofficial arrangement would not impair our ability to continue to provide Taiwan access to selected defensive weapons and other military equipment. From an international political perspective, we had to examine the question of the impact of an unofficial arrangement on stability and peace in Asia and specifically with regard to our expressed interest that any resolution of the Taiwan question be peaceful.

In May 1978, Dr. Zbigniew Brzezinski, the President's National Security Adviser, travelled to China, accompanied by officials from the State and Defense Departments. During that trip, in addition to continuing the dialogue which had begun on global matters, Dr. Brzezinski emphasized once again the President's seriousness about normalization. He further stated that a set of presentations outlining U.S. views on this issue would be made starting later in the summer by the Chief of our Liaison Office in Peking, Ambassador Leonard Woodcock.

While Ambassador Woodcock was making his presentations, China signaled in a variety of ways its desire for closer and more extensive relations with the United States. The Chinese welcomed the visit in July of a delegation led by Frank Press, the White House Science and Technology Adviser. The Press trip led to an agreement on student exchanges, the beginning of cooperation in the science and technology field, and an atmosphere conducive to progress on normalization. From July to December a number of important Congressional delegations, led by Senators Muskie and Williams and Congressmen Wolff, Slack, and Bowen, visited China, and engaged in intensive discussions with the PRC leadership on issues dividing us. Senators and Congressmen were debriefed by State Department officials on their return, and conveyed to them the Chinese leadership positions. The Chairman of the House International Relations Subcommittee on Asian and Pacific Affairs, Lester Wolff, led one such Congressional delegation which met with Vice Premier Teng Hsiao-ping on July 9. At this meeting Teng stated that China would respect realities on Taiwan in working toward unification, and that China would do its best to create conditions permitting solution of the Taiwan question by peaceful means. This conversation, reported back to the State Department by Congressman Wolff and the members of his delegation, and other talks by Senators and Congressmen visiting Peking were important in moving forward the normalization process. On September 19, 1978 President Carter met with Ambassador Chai Tsemin. During this important meeting, Ambassador Chai referred to the Teng-Wolff conversation as being of particular importance in understanding China's position.

Against this background of improving relations, Ambassador Woodcock laid out the American views on normalization in a series of five meetings between July and early November. In the final presentation, on November 4, to further demonstrate U.S. seriousness, Ambassador Woodcock said that we were willing to work toward a January 1, 1979 target date for normalization.

Up to that time, the Chinese had still not made any significant response to Ambassador Woodcock's presentations. Only after a series of internal high-level meetings, which apparently dealt with a wide range of other matters, did the Chinese begin a response. They indicated an interest in working toward the same general target date. Even at that point, however, it was still not clear whether they understood the importance to the United States of certain key matters, including that of arms sales to Taiwan. On December 13, Vice Premier Teng Hsiao-ping summoned Ambassador Woodcock to the Great Hall of the People and, in a remarkable and historic meeting, told him, in essence, that while the Chinese had in no way abandoned their long-standing position on Taiwan and the unity of China, they were ready to move forward immediately taking into full account the points that were critical to the U.S.

Because of the importance of this issue and the need for the two governments to present it simultaneously to the public without the distortions inherent in premature disclosure, the U.S. and China decided to announce the agreement in a joint communique as quickly as possible. We, therefore, made a simultaneous announcement in Washington and Peking at 9:00 p.m. Eastern Standard Time, December 15. At the same time, each side issued a unilateral statement which was not negotiated with the other side but was fully known to it in advance. In addition to the mutual recognition by the two governments effective January 1,

1979, it was announced that Vice Premier Teng Hsiao-ping would pay a State visit to the United States beginning January 29, and that Embassies would be established on March 1, 1979.

#### THE SEPARATION OF POWERS AND THE TERMINATION OF TREATIES

(By Jonathan B. Eddison, M.A., University of Michigan; J.D., Georgetown University Law Center)

##### SUMMARY OF FINDINGS

The President's plans to establish full diplomatic relations with the People's Republic of China, and the notice of termination of the Mutual Defense Treaty of 1954 with the Republic of China, have been challenged as going beyond unilateral Presidential authority. However, the attached memorandum will show that the wisdom of the steps aside, both acts are fully within the power of the President, the historical and legal citations of some of his critics notwithstanding.

In foreign affairs, under the Constitution and by historical practice, the President speaks and acts for the United States. While the power of the President, even in international relations, is not unlimited, this memorandum will show that power encompasses the recent developments in American policy towards China.

The power to recognize foreign nations is an exclusive attribute of the presidency. Leaving all other considerations aside, any President could, under the law, have decided to recognize the People's Republic of China at any time in the last 30 years. Such a step is valid under international law as well as the Constitution, and could only be reversed by another presidential action.

The power to terminate treaties within their own terms (as was done in the case of the Mutual Defense Treaty, by exercising the power under Article X.) or to take other steps provided for in international agreements, is also an exclusive prerogative of the presidency. The case of recognition of the People's Republic of China and the termination of the Mutual Defense Treaty involves additional presidential powers, particularly the commander-in-chief or war power. Though not directly involved in the decisions made by President Carter, the war power could have provided an independent basis from which to make decisions affecting American security, such as terminating the Mutual Defense Treaty and recognizing the People's Republic. These powers are cited only to illustrate the extent of presidential power in foreign affairs, as the law now stands.

The discretionary features of presidential power described above derive from the Constitution, but have grown with the development of the United States as a global power. The Constitution itself is silent on the termination of treaties, and provides little guide for the conduct of foreign relations under our system of separation of powers, especially in these days of advanced industrial nation-states.

Under the Constitution, Congress, especially the Senate, has many powers essential to the maintenance and conduct of America's relations with other states. The Senate can refuse to give its consent to the ratification of treaties, and Congress can enact laws inconsistent with treaty obligations, thus modifying, or even effectively nullifying them. For both House and Senate, the power of the purse is a powerful check on presidential initiatives, as well as serving as a source of Congressional foreign policy initiatives. While these powers in practice give Congress an important role in the conduct of America's international relations, they are powers which require cooperation between the political branches of our government. The President remains the "sole organ" of our nation where the planning and execution of our foreign policy is concerned, thus the President has the only constitutional, unilateral power in the implementation of foreign policy.

Though the Senate does have a Constitutionally mandated role in the making of treaties, its "treaty power" has never extended beyond that limited function despite arguments to the contrary. Once the Senate has given consent to the ratification of a treaty, it cannot withdraw or modify it. To further illustrate the balance of power between legislative and executive branches in this area, the President is not required to ratify a treaty even after the Senate has given its consent. As noted above, the Senate or Congress can limit or nullify a treaty or any other international agreement by taking steps inconsistent with it, but the Senate has no Constitutionally required role in the termination of treaties within their terms.

The Constitution itself does not prohibit violations of international law, such as the abrogation of treaties or treaty obligations. However, under the Constitu-



tion and under international law, only the President can terminate a treaty within its terms.

#### CONCLUSION

Two broad generalizations on the question of the separation of powers and the termination of treaties can be drawn from a study of American history:

(1) Different Presidents and Congresses have struck different balances and solutions to the problem, unhampered by a rigid application of the separation of powers;

(2) That there has been a progressive increase in the power of the Executive Branch in the area of international relations, as Congressional debate over the War Powers Act would attest.

Though those claiming that a Constitutionally required role for the Senate in the termination of treaties exists can find some historical examples (primarily from the nineteenth century) to support their claim, there are far more examples of the independent exercise of the power to terminate treaties by the President. Twentieth-century practice overwhelmingly supports the Constitutionality of President Carter's decisions with respect to China.

Under the terms of the Mutual Defense Treaty, the President as a "party," is fully within his powers, explicit, implicit, and historically acquired, in giving notice on behalf of the United States of termination of the Mutual Defense Treaty of 1954 with the Republic of China. Recognition of the People's Republic of China, as that of any other nation, is an exclusive function of the presidency, beyond the reach of Congress. There is no compelling legal basis for claiming that either act is an impeachable offense because the Senate had not been consulted and had not been given prior formal approval.

Senator Goldwater and others have quoted strong language to the contrary from the Senate Manual, and a 1930's Library of Congress study of the Constitution. The Senate Manual is neither binding, nor is it in accordance with the law, and the Library study is without legal status.

This is not to say that President Carter cannot or, politically speaking, should not consult with Congress and Congressional leaders about these or any other foreign policy initiatives. Congress has already made clear its desire to be consulted on precisely these questions. On July 25, 1978 a sense of the Senate resolution was passed in the form of an amendment (the Dole-Stone Amendment) to the International Security Assistance Act which suggested that " \* \* \* any proposed policy changes affecting the continuation in force of the United States-Republic of China Mutual Defense Treaty shall be a matter for prior consultation with the Senate." The House-Senate Conference Committee on the bill amended the language of the resolution to "make clear that the House of Representatives is to be included in the consultation process." The President signed this admittedly non-binding amendment into law on September 26, 1978.

Though the amendment to the International Security Assistance Act is not binding on the President, it is fully within the power of Congress to make such a suggestion. Furthermore, President Carter may have to pay a political price for failing to consult with Congress. But this is a political question consigned by the Constitution and history to resolution through the political process, rather than in the courts.

#### INTRODUCTION

President Carter has committed the United States to the recognition of the People's Republic of China ("PRC") as the government of China, and has given formal notice of termination of the Mutual Defense Treaty of 1954 with the Republic of China ("ROC") on Taiwan. Until these steps were taken, the United States maintained official diplomatic relations with the ROC and did not formally dispute its claim to sovereignty over the mainland. As a consequence of United States' China policy since 1949, a host of economic, political and legal ties have developed between the U.S. and the ROC in the form of some 59 treaties and agreements in addition to the Mutual Defense Treaty. Many and perhaps all of these interests will be affected to some degree by the change in relations between the three governments.

Though the timing and details of President Carter's actual decision and announcement were unexpected, the decisions themselves have not been unanticipated. Every aspect of American relations with the ROC and PRC has been discussed and weighed at some time over the past years. In 1977 the House Subcommittee on Asian and Pacific Affairs held hearings in anticipation of recognition of the PRC. ("Normalization of Relations with the People's Republic of China: Practical Implications," Hearings before the Subcommittee on Asian and Pacific Affairs of the Committee on International Relations, 95th Cong., 1st Sess.

1977). In December 1978, the Subcommittee published its recommendations on Normalization following a mission to the PRC. ("A New Realism: Factfinding Mission to the Peoples Republic of China, July 3-13, 1978" Report by the Subcommittee on Asian and Pacific Affairs to the Committee on International Relations, 95th Congress, 2nd Session, 1978). The importance of the international political questions involved, the value of the economic ties between the U.S. and the ROC, and the history of American involvement in Chinese politics, have produced disagreements over the merits of the changes initiated by President Carter.<sup>1</sup> In a uniquely American fashion, the debate over policy has surfaced in a dispute over the exercise of the powers necessary to the rearrangement of Sino-American relations.

Under the Constitution, these are separation of powers problems, drawing Congress and the Executive Branch into conflict. The issue turns on the question of which powers involved in the termination of treaties are exclusive to one branch or the other, and which are shared, by custom or under the Constitution.

Senator Goldwater is the most prominent critic of President Carter's decisions with regard to China, and has brought the dispute to a head by filing suit in federal district court on December 22, 1978 (No. 78-2412) complaining that the President's actions violated Constitutional requirements. In 1978 Senator Goldwater published a study entitled "China and the Abrogation of Treaties," under the auspices of the Heritage Foundation, laying out his Constitutional argument. On July 25, 1978 Senator Goldwater joined a number of fellow Senators in a sense-of-the-Senate resolution stating that " \* \* \* any proposed policy changes affecting the continuation in force of the United States-Republic of China Mutual Defense Treaty shall be a matter for prior consultation with the Senate." Cong. Rec. S11713 (daily ed. July 25, 1978). Senator Goldwater filed suit in the United States District Court for the District of Columbia following President Carter's announcement of the decisions to terminate the Mutual Defense Treaty and recognize the PRC.

In the Heritage Foundation Study, Senator Goldwater ranges over American political and Constitutional history to support his claim that:

(1) No President can terminate a treaty unless he first obtains the consent of Congress;

(2) that there is a Constitutionally required prior role for the Senate in the termination of treaties; and

(3) that presidential action in violation of these principles would be an impeachable offense. (Id. at p. 9)

Senator Goldwater states that his argument is limited to treaties in the Constitutional sense, and does not reach other international agreements to which the United States is a party, such as executive agreements. Senator Goldwater concedes the pre-eminent role of the President in foreign affairs, but insists that actions such as those taken by President Carter overstep the bounds of Presidential power. As Senator Goldwater reads American history, it cannot support such a "unilateral" step by a President, and confirms Senator Goldwater's own views on Constitutional practice. Senator Goldwater even argues that under international law, the President is not a "party", that a President acting "alone" could not terminate the Mutual Defense Treaty with the ROC. Thus, Senator Goldwater concludes that "no President acting alone can abrogate, or give notice of the intention to abrogate, our existing treaties with the government on Taiwan \* \* \* Any President who would seek to thwart this constitutional mandate runs the risk of impeachment." (Id. at p. 30)

This memorandum was prepared at the behest of the House Subcommittee on Asian and Pacific Affairs in anticipation of recognition of the PRC and in response to the issues raised by Senator Goldwater. The memorandum's focus is upon the power of the Chief Executive to terminate treaties, but will address the major points contained in Senator Goldwater's argument. (The memorandum has benefited from the suggestions of Prof. Don Wallace, Jr. of Georgetown University Law Center and Ariantje DuBois, though neither bears any responsibility for any errors within it.)

The problem raised by Senator Goldwater in his study and in his Lawsuit is only the latest installment in a debate which has lasted as long as the republic over the separation of powers in foreign affairs. The motive power of these periodic debates between Presidents and Congress over the separation of powers in the conduct of America's international relations comes from the contradiction between our national government of enumerated powers, and the simultaneous existence (and necessary exercise) of the full powers of a sovereign nation in the international state system.

<sup>1</sup> The Kennedy-Wolff resolution on Taiwan's security was incorporated into the Taiwan Relations Act and signed into law on Apr. 10, 1979.



The importance of this contradiction is underlined by the silence of the Constitution about many aspects of the now routine creation and administration of the foreign policy of the United States. For example, the Constitution does not mention the making of foreign policy or executive agreements, much less planning global nuclear strategy. In other areas touching on foreign policy the Constitution is not silent; for example, the treaty-making and ratification process. But the Constitution does not provide easy answers to problems raised by the demands of contemporary international relations. This Constitutional silence is at the heart of the problem under review here, as the Constitution only describes how treaties are to be made, not how they are to be ended. (Art. II, § 2)

This Constitutional silence, both as it regards treaty termination and foreign affairs in general, has produced a mass of conflicting precedents and opinions, in the face of the full flowering of the modern nation-state. It has also led to a continuing acquisition of "plenary power" in the conduct of foreign affairs by the Executive Branch.

#### I. THE INTERNATIONAL LAW FRAMEWORK

Diplomatic recognition is usually extended to new regimes meeting certain minimum conditions, but the case of Sino-American relations involves factors not normally present in a recognition decision. (For a general discussion of recognition, see Brierly, "The Law of Nations" (6th ed., 1963) pp. 137-155—minimum conditions of organized government, defined territory under effective control and independence from control by other states; and see the discussion of the unique factors in American recognition practice in Victor Li's study, *supra*, pp. 4-8).

International law is the law of the relations and obligations between sovereign nation-states. While the PRC and the ROC both can claim sovereignty and nationhood for the territory they respectively control, they cannot both be the government of China. China, as the Shanghai Communique of February 27, 1972 recognized, is taken by all parties involved to include the island of Taiwan. So long as this continues to be true, the rival claims of the PRC and the ROC to what can only be one sovereignty have confronted the international state system with a contradiction, heightened by the length of time for which it has persisted.

A "treaty" is an international contract between nation-states. (See, generally, Brierly, *supra*, at pp. 317-45, esp. 317-18.) A treaty is only a term for one type of international agreement, but since it is a treaty which is at issue here, for the purpose of this memo, this basic definition will do. International law scarcely limits the subject matter of treaties, as the limits come rather from political considerations and constraints recognized by the contracting parties. Those familiar with basic contract law will recognize many concepts in treaty law. For example, treaties can end upon a certain date, after a specified event has taken place, or for failure to renew. Again analogous to contract law, there are certain accepted doctrines under which a State can withdraw from a treaty or refuse to perform its obligation under it, such as material breach by the other party, or impossibility of performance, such as war. Many treaties provide for simple termination by notice, as in the Mutual Defense Treaty. There are also many concepts special to international law as well, not relevant here. (See for example, Brierly, *supra*, at p. 327; and the Vienna Convention on the Law of Treaties of May 23, 1969, Articles 48, 49, 60, 61, & 62 for examples of contract concepts, and Articles 31, 50, 59, 63 and 64 for examples of special international law concepts.)

Treaties can also end or lose their force by being broken, as when a party fails to honor a necessary treaty obligation or engages in conduct inconsistent with the requirements of a treaty. Such behavior is improper under international law, but the international state system offers far fewer formal remedies than does domestic contract law for an analogous contract dispute.

"Termination" can be used to describe the end of treaties in all of the above-mentioned circumstances, but to so apply it would cover a range of qualitatively different actions, legitimate and illegitimate. An important analytic distinction must be made between termination and "abrogation", with termination defined as the ending of treaties on or within their terms, (or for an internationally sanctioned reason), while abrogation implies willful nullification or breach of treaty obligations.

The fatal flaw in Senator Goldwater's study, "China and the Abrogation of Treaties" lies in the failure to distinguish between the concepts of termination

and abrogation as described above. By using them interchangeably, Senator Goldwater makes judgments about one type of action only appropriate for the other. (See, for example, the statement at page 26 of the study: A number of other treaties have been terminated by rescission of new treaties on the same subject.) As shall be described below, the President has full power to terminate treaties within their own terms, while both branches can constitutionally violate international law by taking steps which abrogate treaties.

Nor is it true, as Senator Goldwater argues in his lawsuit, that the Senate is a necessary party to the Mutual Defense Treaty under international law. The error in this approach lies in the improper equation of the Senate's undeniable role in the making of treaties with the role of the United States as a party to a treaty. Only states can make treaties. The President speaks and acts for the United States in foreign affairs as its exclusive agent. While the Senate has a constitutionally required role in treaty-making, it has no independent standing under international law. Thus the "parties" to the Mutual Defense Treaty of 1954 are the United States and the Republic of China, represented by their chiefs of state.

## II. THE TERMS OF THE MUTUAL DEFENSE TREATY OF 1954

The Mutual Defense Treaty between the United States and the ROC pledges the two nations to mutual defense for the purpose of deterring aggressors and resisting communist subversion consistent with the terms of the United Nations Charter (Articles I & II, the Charter Preamble). Article V of the Treaty declares that: "Each Party recognizes that an armed attack in the West Pacific Area directed against the territories of either of the Parties would be dangerous to its own peace and safety and declares that it would act to meet the common danger in accordance with its constitutional processes." Article VI defines the territory of the ROC which the U.S. pledges to defend as being Taiwan and the Pescadores.

For the purposes of this memorandum, the most important article is Article X, which states that the Treaty "shall remain in force indefinitely" and goes on to say that "Either Party may terminate (the Treaty) one year after notice has been given to the other Party". No special conditions or requirements for termination are stated other than the one-year notice provision.

This memorandum investigates the problem of separation of powers and the termination of treaties in light of the distinction between abrogation and termination made above in view of the steps actually taken by President Carter.

## III. THE SEPARATION OF POWERS AND FOREIGN AFFAIRS

Article II, § 2 of the Constitution begins: "He (the President) shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur. \* \* \*" This terse sentence is the sole guide to be found in the Constitution to the making and termination of treaties (at least without the interpretation or extension of other provisions). Treaties are mentioned elsewhere in the Constitution (in Article III, § 2 jurisdiction over cases arising under treaties is given to the federal courts, and Article VI, § 2, treaties are declared to be the "Supreme Law of the Land" along with the Constitution and the Laws of the United States) but neither section helps to answer the question of the separation of powers and the termination of treaties.

Senator Goldwater argues that as Article II of the Constitution requires the President to "take care that the laws be faithfully executed", and that as a treaty is given the force of law through the Supremacy Clause, a treaty can only be terminated by the "lawmaking" power—"The general rule might be stated as follows: As the President alone cannot repeal a statute, so he alone cannot repeal a treaty." ("China and the Abrogation of Treaties," p. 13.) Furthermore, Senator Goldwater contends that the desire of the Framers of the Constitution that the United States honor treaty obligations compels the conclusion that the Constitution requires the consent of two-thirds of the Senate, or of Congress, to the termination of a treaty. (Id. at p. 27.)

Neither proposition can stand close scrutiny according to the research carried out in preparation of this study.

In view of the silence of the Constitution about the termination of treaties, it is no more logical to claim as Senator Goldwater does that if the treaty making



power lies in the President and Senate together, then the treaty termination power must also belong to them jointly, than it is to argue that the very silence of the Constitution withdraws the termination power from the Senate—*expressio unius est exclusio alterius*. (Translation: the expression of one thing implies the exclusion of another thing; a well known maxim of statutory construction.) Though a treaty by virtue of the supremacy clause has the force of law, it cannot be so easily equated with legislation.

First, it can reasonably be pointed out that the Constitution provides two different procedures for law-making (legislation and the treaty-making process) similar only in the shared supremacy of their legal "result". Any attempts to equate the treaty-making procedure with the legislative process ignores the express language of the Constitution. Second, other non-legislative acts have the force of law in the United States (see below for a discussion of executive agreements and other Executive acts having the force of law). "Law" is not made only by the legislative branch.

Finally, it cannot be demonstrated that the Framers planned to allow one-third of the Senate plus one to have a veto power over changes in the formal international relations of the United States. Though putting the question to an imagined participant in the Constitutional Convention is not the most rigorous of arguments, it serves to point out the weakness of Senator Goldwater's speculations as to the intent of the Framers in this area. In addition, posing the problem in this fashion illustrates the undemocratic consequences of a rigid interpretation of this separation of powers problem.

Indeed, the question of the procedure for terminating treaties was scarcely mentioned at the Constitutional Convention, and there were no significant proposals to delineate the termination procedure. As far as the treaty power and treaties were concerned, the delegates to the Constitutional Convention were much more concerned with preventing the interference by the States in the foreign relations of the new nation. (See, e.g. Art. 1, § 10; M. Farrand, "The Records of the Federal Convention" (rev. ed. 1966) Vol. I, pp. 47, 164, 171; Vol. II, pp. 135, 442.) There was agreement that the treaty power should be an exclusive attribute of the national government. True, there was disagreement over which branch was to exercise it. (Farrand, Vol. I, pp. 292, 300; Vol. II, pp. 144-45) and indeed there was at least as much fear of an abuse of power by the Senate as there was of the Executive. (Farrand, Vol. II, pp. 297, 392, 538, 547-50.) Apparently the consent power was put in the Senate to protect the smaller states, who feared abuses of the treaty power. (Farrand, Vol. III, pp. 384-89.)

Thus, there is no easily determinable textual answer to the problem of the separation of powers and the termination of treaties. The much sought-after "intent of the Framers" can only be found in the words of the Constitution. No other interpretative source can be shown to be compelling, and reliance on any other source would place an individual or a faction in a position superior to the Constitution itself. To that extent, the records of the Convention are valuable because they reveal no clear plan on the parts of the Framers of the Constitution. The vagueness of the constitutional language concerning the treaty power may have been deliberate. (Farrand, Vol. III, pp. 369-70) in order to encourage a cooperative interpretation of the separation of powers instead of an inflexible "bright-line" position.

Looking at the Constitution and the Constitutional Convention, it is at least as plausible to reach conclusions directly opposite to those of the proponents of a necessary role for the Senate in the termination of treaties. One obvious potential source of guidance is history and practice under our Constitutional scheme.

However, historical practice is only persuasive if it is unanimous or nearly so. Such unanimity could then be taken to represent an enduring consensus as to the proper constitutional interpretation and could be relied upon in constitutional politics. On the other hand, a mixed bag of historical episodes and incidents can support diverse schools of thought, without providing a firm foundation for any one.

#### IV. THE LESSON OF HISTORY

In fact, historically, a variety of different approaches have been taken to the termination of treaties in the United States, although there is an emerging trend towards the exercise of discretionary power by the Executive Branch. Therefore, there is little merit in an exhaustive compilation of historical incidents and anecdotes. A few examples will suffice to show the range of treaty termination practices and the acquisition of Executive power in this area.

President Lincoln gave Great Britain notice of termination of the Rush-Bagot convention in 1864. A resolution authorizing the President to give the required notice passed the House but not the Senate. Subsequent to President Lincoln's action, a joint resolution was passed "ratifying" the President's action. Senator Goldwater describes this resolution as a "rebuke" to President Lincoln and as an action "in defense of (Congress) prerogative." ("China and the Abrogation of Treaties", p. 17.) Rebuke or not, Lincoln later withdrew the notice and the treaty remained in force. Whatever the domestic political consequences of President Lincoln's actions were, this episode hardly can be taken as convincing evidence of a Constitutionally required prior role for the Senate in the termination of treaties.

In 1879, Congress passed a bill requiring President Hayes to abrogate several articles of the 1868 Treaty with China. President Hayes vetoed the legislation, stating that it was an unconstitutional attempt to modify an existing treaty. He also acknowledged that Congress could terminate treaties by signalling the refusal of the nation to comply with them. President Hayes thus acknowledged that Congress could constitutionally violate international law by abrogating treaties (see below) but certainly did not "uphold the traditional joint role of the President and Senate together to make or modify treaties, as claimed by Senator Goldwater in his study. (Id. at p. 19.)

The actions and views of President Taft regarding the termination of the Russian Treaty of 1832 show the confusion surrounding the termination of treaties and the separation of powers, as well as the futility of expecting an unambiguous line of precedent from history. President Taft gave notice of termination of the treaty in 1911. His action was subsequently approved by joint resolution, but Taft later asserted that the power to terminate treaties belonged to the President. Certainly no prior consent of Congress was required in his view. (Taft, "Our Chief Magistrate and His Powers" (1925), pp. 116-17.)

Senator Goldwater argues that Taft's action "was a concession to recognized congressional power" (Id. at p. 21) in light of the desire of Congress to abrogate the treaty. President Taft's views on the power of the Chief Executive to terminate treaties were not consistent, but Senator Goldwater is in error when he asserts that President Taft "made no claim that his diplomatic notice would have any validity without legislative approval" (Id. at p. 21).

The trend in treaty-termination practice in this century has unmistakably been towards uncontradicted discretionary power in the Executive Branch. Even Senator Goldwater concedes that, noting nine different instances where Presidents have given notice of termination without prior or subsequent Congressional approval. (Id. at 23.)

For example, President Franklin Roosevelt gave notice of termination of the Extradition Treaty of 1931 to Greece in 1933, prompted by the refusal of the Greek government to extradite an individual suspected of fraud. The notice was withdrawn, but the incident is a perfect example of the power of the President to determine when a treaty has been violated by another party to it, and to terminate it if deemed necessary. This episode cannot be distinguished by Senator Goldwater, merely because the notice of termination was withdrawn but stands as proof positive of the uncontested Presidential power in the area of treaty termination.

In 1965, in order to secure a revision in the Warsaw Convention pertaining to limitations on the liability of international air carriers, the United States announced its intention to withdraw from the compact. Representatives from the State Department testified before the Senate Foreign Relations Committee about the plans of the administration, but never sought formal approval for the decision of President Johnson. In fact, the scare tactic worked and the United States withdrew its notice of termination. No challenge to the tactics of the administration was made, and this is but another example of the uncontested exercise of Presidential discretionary power in the conduct of foreign affairs.

Each example provides only a bare summary of complex events, and this short list is by no means all-inclusive. Yet, these examples show the futility of attempting to find any lesson from history beyond the steady increase in the power of the Executive. Evidently, there has been a history of flexible sharing of power between the branches of government with overlapping powers in foreign affairs as well as the growth in the power of the Presidency. In view of the vast changes in the world and in the base of inter-state relations, it would seem reasonable to argue that recent patterns reflect the balance of the Constitutional scheme in the twentieth century. This is certainly more plausible than



it is to argue chiefly with examples drawn from the eighteenth and nineteenth centuries that Congress or the Senate have a constitutionally required prior role in the termination of treaties.

Other students of Constitutional history support this conclusion, finding that Presidents and Congresses have worked out different processes for terminating treaties at different times. The most exhaustive study of the separation of powers as it affects international agreements can be found in the article by McDougal and Lans, "Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy", 54 Yale L.J. 181, 534 (1945), in which the authors catalogue seven different approaches of the termination of treaties, all actually followed by different Presidents and Congresses (at 334-37).

These examples reflect the disparity of the incidents discussed above. No clear pattern can be read from them, and taken on their face, the approaches are contradictory. Presidents have terminated treaties on their own motion, and sought the consent of Congress. "Overwhelming historical support" for any one interpretation can only be created through careful selection from the conflicting practices of earlier times. All that can safely be said is that there has been a general pattern of Executive cooperation and consultation with Congress, combined with distinct exceptions for Executive initiative at the discretion of the President. This is quite different from claiming as Senator Goldwater does that Presidential termination of the Mutual Defense Treaty with the ROC without securing the consent of the Senate is unconstitutional, or an impeachable offense.

#### V. THE POWER OF THE PRESIDENT IN FOREIGN AFFAIRS

The totality of separation of powers in foreign affairs is a difficult subject, far beyond the scope of this memo. (See L. Henkin, "Foreign Affairs and the Constitution," 1972.) But the separation of powers in connection with the termination of treaties cannot be understood without some recognition of the vast power now exercised by the President in foreign affairs and in the making of treaties. Whatever the intent of the Framers, the President has become the pre-eminent figure in the creation and administration of American foreign policy. A partial explanation for this pre-eminence can be found in the monopoly of the Executive Branch on communications with other governments, an area forbidden to Congress. In the eyes of the world, the President speaks for America and to a large extent, the world speaks to America through him. The contradiction mentioned at the outset of this memorandum has worked to the advantage of the Executive, as it is the branch best suited to exercise the sovereign powers of the nation in the world of nation-states. It may only be through hindsight that this gradual increase of power seems inevitable, but it is apparent and to date, apparently irreversible. (See below for statements of recognition of Executive power by courts and commentators.)

Three "powers" must be described briefly before this discussion can re-focus on the termination of the Mutual Defense Treaty: the "treaty" power, the "recognition" power, and the "commander-in-chief" power.

In spite of the provision for the advice and consent of the Senate in the making of treaties, the negotiation of treaties is now accepted as the sole prerogative of the President, though in his political judgment he may consult with Congress, the Senate or individuals. (See, for example, of consultation at the initiative of the President, Lowenfield and Mendelsohn, "The United States and the Warsaw Convention," 31 J. Air L. & Comm., 291, 301 (1965); see also, McDougal at 206-7 for a description of the early abandonment of the Senate's role in negotiating treaties). Only the President can decide whether to negotiate a treaty, and when and whether to enter into or break off negotiations. As Henkin sums it up:

"Presidents have refused to send to the Senate treaties already negotiated; they have withdrawn treaties from the Senate before it acted; they have refused to ratify treaties to which the Senate consented; they have refrained from pressing for Senate consent to treaties submitted by their predecessors \* \* \*" (at 133).

Furthermore: "Once the Senate has consented, the President is free to make (or not to make) the treaty and the Senate has no further authority in respect of it. Attempts by the Senate to withdraw, modify, or interpret its consent after a treaty is ratified have no legal weight; nor has the Senate any authoritative voice in interpreting a treaty or in terminating it." (At 136; see also McDougal, at 209, n. 64.)

In addition to the discretionary powers of the President as regards treaties, Presidents can make (and have frequently done so in the past) binding international agreements (i.e. executive agreements) which are not "treaties," and therefore do not require the consent of the Senate or even, in some cases, of Congress (see generally, McDougal). This practice has been affirmed by the Supreme Court, as will be discussed, and has never been successfully challenged. Just as treaties can be the supreme law of the land, so too can some executive agreements.

Leaving to one side the question of the source of the power, the President does have the sole power to recognize other states or to break off diplomatic relations. (See Henkin at 47 and Art. II, § 3.) While there is little disagreement that the recognition power belongs to the President, this power can be distinguished from the power to terminate treaties. In the case of the Mutual Defense Treaty with the ROC, the separation between the recognition power and the power to terminate treaties disappears. Recognition by the United States, through the President, of the PRC as the government of China, causes the ROC to cease to exist as far as the United States is concerned at least as the government of China. There is no necessary reason why U.S.-Taiwan relations could not continue on a revised basis, but only on the ground that the ROC make a sovereign claim different from that of "China". Again, these issues are beyond the scope of this memo. Recognition of the PRC neither terminates nor abrogates the Mutual Defense Treaty; instead, the treaty's conceptual basis would be nullified. As far as the U.S. is concerned, the ROC could not re-appear on the international legal scene, after the recognition of the PRC, except as a different nation. (See the testimony of Jerome Cohen, *supra*.)

Victor Li's explanation of the theory of "de facto recognition" turns on an acknowledgement of two separate societies.<sup>2</sup> Under the theory, the United States could either ignore the rival claims to "China" made by the PRC and the ROC and treat them as different nations, or accept the PRC's claim in principle but continue to deal with the ROC. Japan has followed just such a course in recognizing the PRC while simultaneously continuing to trade with the ROC. Japan does not officially deny the sovereignty of the PRC.

The commander-in-chief powers of the President may be the broadest of all his powers. (See generally, Wallace, "The War-Making Powers: A Constitutional Flaw?" 57 Cornell L. Rev. 719 (1972).) This power is mentioned in connection with the Mutual Defense Treaty and the problem of its termination precisely because it is a defense treaty. Thus, another major presidential power is drawn into this question, and this power is one which Congress has very limited power to control—in the sense of discretionary, policy decisions, not in the sense of the power to raise armies. In view of global strategy and American military policy the President as Commander-in-Chief could terminate the Mutual Defense Treaty on its terms without substantial procedural challenge from Congress. There may well be a political price to pay for such a decision, internally and externally, but that price will vary with the times and the political skill of the President, and should not be equated with a Constitutional prohibition from taking that step.

The combination of the institutional advantages of the Executive Branch—the monopoly on communications with foreign governments, internal efficiency, secrecy and collection of information, for example—the contradiction between the national separation of powers and international sovereignty, and the emergence of the United States as a world power have produced the great Presidential power briefly described above. Discretionary judgments, as the termination of a treaty on its terms, are the province of the branch of government best qualified to make them. In the eyes of the world, the President acts for the U.S.

Thus, the sum of domestic and international precedent indicates that the President can take the steps necessary to terminate a treaty on its terms, without consulting Congress or the Senate. Restatement (Second) of Foreign Relations Law of the United States, § 163 (1965).

<sup>2</sup> "Normalization of Relations with the People's Republic of China: Practical Implications," Subcommittee on Asian and Pacific Affairs, 1977, U.S. Government Printing Office, p. 83.



## VI. THE CONSTITUTIONAL ROLE OF CONGRESS IN FOREIGN AFFAIRS

The President of course is not a monarch, even in the conduct of foreign relations. His actions and decision are subject to countless political constraints, and most major decisions bring Congress into the process as they require legislative support (as in the war in Indo-China, which, though, undeclared, was supported every year, following the Tonkin Gulf Resolution, by Congress through the appropriations process). In the field of foreign affairs no President has yet attempted to proceed in reckless disregard of the sentiments of a legislative majority, even though he technically would have the power to do so at least for the 60 days mandated by the War Powers Act.

Besides the role explicitly given to the Senate in the making of treaties, Congress has many powers which insure its cooperation or assent for the effective survival of any international agreement to which the U.S. is a party. Many international agreements, treaties as well as executive agreements, require supplemental legislation, or the appropriation of funds. Congress has neither a Constitutional nor an international legal duty to enact legislation necessary under the terms of a treaty, or to appropriate funds to meet an international obligation. No President can command such legislation. Obtaining it is entirely a political process, and thus one which gives Congress great bargaining power.

Congress certainly has the power to abrogate a treaty. It can refuse to pass necessary supplemental legislation, or may even enact subsequent inconsistent laws, nullifying the effect of any international agreement. These are attributes of the legislative power of Congress, and therefore Presidents have been careful to cultivate Congressional support for their foreign policy.

However, the power to abrogate treaties is not the same as the President's power to terminate treaties. Either the Executive branch or Congress can effectively nullify or abrogate an international obligation of the U.S., limited only by the political consequences of the act, not by the separation of powers. Neither branch can prevent such a step by the other, except through political means. In fact, there is good reason for believing that the increasing use of the executive agreement and other procedures bypassing the treaty requirement stems from the abuse of the one-third veto by the Senate in the bitter fight over American participation in the League of Nations—see McDougal at 558-61.

It is impossible to reconcile the actual extent of Presidential power with the argument advanced by the proponents of a mandatory Congressional role in the termination of treaties. The power of the President is the strongest refutation of the position that the President may not terminate the Mutual Defense Treaty without first obtaining the approval of Congress, and is also the basis for the more accurate recognition of the overlapping powers of the two branches, and the essentially political nature of the "checks and balances" in the separation of foreign affairs-related powers.

## VII. OPINIONS AND COMMENTARY ON THE SEPARATION OF POWERS AND THE TERMINATION OF TREATIES

The difficulty of the problem of the separation of powers and the termination of treaties has invited a considerable amount of commentary. Senator Goldwater is not the first to reach the conclusions that he now advocates, and there are in the mass of opinions and views a number of statements which take essentially the same position and are cited by him. Just for example, there are James Madison's views on treaty termination; an 1856 Report of the Senate Foreign Relations Committee; speeches in 1865 by Senators Davis and Sumner (the latter in turn quoting from Story's "Commentaries on the Constitution," and Justice Iredell in *Warc v. Hylton*, see below); a law review article prompted by the proposed revisions in the Warsaw Convention; statements by Presidents Hayes and Taft; opinions by Secretary of State Hughes, an Acting Attorney General, and Professor Corwin's book, "The President's Control of Foreign Relations."

While the authors of these opinions certainly share certain common assumptions and conclusions, they cannot be pooled together to create the semblance of a consensus of opinion throughout American history on this issue. There are and there have always been equal numbers of commentators taking directly opposite positions.

As Justice Jackson so aptly observed in his concurring opinion in *Youngstown Co. v. Sawyer*, 343 U.S. 579, 634-35 (1952):

"A judge, like an executive advisor, may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves. Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from material almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other." (See also the footnote to this quotation, "A Hamilton may be matched against a Madison", etc.)

Even cursory review of the literature on the subject proves Justice Jackson's point. In addition to the views of such authorities as Henkin, McDougal, Lans, and Wallace discussed above, numerous writers have promoted or acknowledged the reach of presidential power in foreign affairs. President Taft can be cited not only by proponents of Senate power, but also by those finding a discretionary power to terminate treaties in the highest Executive office. W. Taft "The Presidency," (1916), pp. 112-117.

In his article, "The Jones Act and the Denunciation of Treaties," 15 Am. J. Int'l Law 33, 38 (1921), Reeves says, after a review of the political history, "It seems to be within the power of the President to terminate treaties by giving notice of his own motion without previous Congressional or Senatorial action." Writing years later, Nelson reaches a similar conclusion: "Diplomatic practice coupled with judicial opinion demonstrates that the President as the chief organ of foreign relations, has the primary responsibility with respect to the termination of treaties. He may perform this function alone or in conjunction with the Congress or the Senate." "The Termination of Treaties and Executive Agreements by the United States: Theory and Practice", 42 Minn. L. Rev. 879, 906 (1958).

Perhaps the single most influential opinion on this problem comes from John Marshall in a speech in the House of Representatives, before becoming the third Chief Justice. Discussing a decision under an extradition treaty, Marshall said:

"The president is the sole organ of the nation, in its external relations, and its sole representative with foreign nations. Of consequence, the demand of a foreign nation can only be made on him. He possesses the whole executive power. He holds and directs the force of the nation. Of consequence, any act to be performed by the force of the nation, is to be performed through him. He is charged to execute the laws. A treaty is declared to be a law. He must then execute a treaty, where he, and he alone, possesses the means of executing it." (The speech is printed in 18 U.S. (5 Wheat.) 201, 212.)

Quincy Wright, a noted Constitutional writer of an earlier generation, found that the discretionary power to decide when the provisions of a treaty are terminated belongs to the President along with the power to denounce treaties, while simultaneously finding that the consent of Congress was necessary. Q. Wright, "The Control of American Foreign Relations" (1922), pp. 256-60 (examples given).

The difficulty of the problem of the separation of powers and the termination of treaties is illustrated by the conflicting conclusions of Wright. Many other students of the problem have been reluctant to endorse unfettered discretionary power for either branch, preferring instead a sharing of power between the branches, while stopping short of finding an express Constitutional mandate for a particular procedure.

An articulate statement of this position comes from Stefan Riesenfeld, who found a shared power to terminate treaties "most logical" and went on to say, " \* \* \* the *Curtiss-Wright* case has reaffirmed the rule that the President and Congress, cooperating in the field of international relations, are not hampered in the attainment of a smooth-running and adaptable (foreign) policy by the obstacle of a strict application of the doctrine of separation of powers. ("The Power of Congress and the President in International Relations: Three Recent Supreme Court Decisions", 25 Cal. L. Rev. 643, 659, 669 (1937). (See also Reeves at p. 38; E. Corwin, "The President's Control of Foreign Relations" (1917), p. 115.)

In conclusion, Justice Jackson's telling language in *Youngstown* (quoted above) accurately assesses the futility of relying upon the commentators. As with the review of the Constitution, the Constitutional Convention and historical practice, the strongest conclusion is a negative one: no clearcut pattern of practice can be found, nor has there ever been an enduring consensus of opinion as to a final resolution of the issue.



Indeed, the recurring theme throughout these sources of interpretation is that of political resolution and settlement of treaty problems. Political solutions vary with the politics of the time, and permit executive discretion. The advocates of the requirement of prior consent of two-thirds of the Senate to the termination of a treaty to the contrary, the history of the 20th century American practice of treaty termination allows the President great latitude, and thus would seem to encompass the termination of the Mutual Defense Treaty on its terms.

#### VIII. THE SUPREME COURT AND THE SEPARATION OF POWERS IN FOREIGN AFFAIRS

Treaties are the "supreme law of the land" (Art. VI, §2) and the Supreme Court has repeatedly invalidated state laws inconsistent with treaty terms (*Missouri v. Holland*, 256 U.S. 416 (1920); see Henkin at 165). Thus, Supreme Court, as the third branch of government under the Constitution, must be taken into account in any discussion of the separation of powers.

For the purposes of this memo, three general points can be made about the Supreme Court and the separation of powers problem posed here: (1) There is no holding on point by the Court on the separation of powers and treaty termination; (2) There is great judicial deference to the "political branches" with regard to foreign affairs; (3) There has been express judicial recognition of the primacy of the Executive Branch in the conduct of America's international relations.

It is doubtful that a question such as the one posed by this memorandum could or would be decided by the Supreme Court. The Court has long been chary of intruding into America's foreign relations. This deference comes from a number of sources, including the limitations of the judiciary in dealing with essentially political problems, the inappropriateness of judicial cognizance of the power politics of foreign policy, and a recognition of the limited role assigned to the Court by the Constitution. (See generally, Henkin, Chap. VIII.)

In one of the leading opinions on the position of the judicial branch in the separation of powers, the Supreme Court had occasion to review in passing the separation of powers principles in foreign affairs:

"Our cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action. For example, though a court will not ordinarily inquire whether a treaty has been terminated, since on that question 'governmental action \* \* \* must be regarded as of controlling importance if there has been no conclusive 'governmental action' then a court can construe a treaty and may find that it provides the answer, (citations omitted) \* \* \* 'While recognition of foreign governments so strongly defies judicial treatment that without executive recognition a foreign state has been called 'a republic of whose existence we know nothing', and the judiciary ordinarily follows the executive as to which nation has sovereignty over disputed territory, once sovereignty over an area is politically determined and declared, courts may examine the resulting status and decide independently whether a statute applies to that area.' *Baker v. Carr*, 369 U.S. 186, 212-13 (1962).

While this is not exhaustive, it captures the basic attitude of the Court. This judicial caution in face of such highly political problems would make it unlikely that the Court would wish to rule on the case of the termination of the Mutual Defense Treaty with the ROC. Thus, the problem would be left to resolution by the political process.

There have been several 20th century cases in which the Supreme Court has recognized and enforced the broad presidential power briefly described above. In *United States v. Curtiss-Wright*, 299 U.S. 304 (1936), the Court in an opinion by Justice Sutherland, adopted the "sole organ" language of John Marshall quoted earlier in the course of holding that the President could prohibit the sale of arms to participants in the hostilities in the Chaco region of South America. Justice Sutherland found that the national government was vested with sovereign powers not necessarily dependent upon specific Constitutional grants, and that those powers were largely exercised by the President. Under this interpretation, the President had "the very delicate, plenary and exclusive power \* \* \* as the sole organ of the federal government in the field of international relations \* \* \*" (Id. at 320.)

There has been scholarly disagreement over Sutherland's explanation of the source of the external sovereign powers of the United States, but the Supreme

Court has never trimmed back on this explanation. (See L. Tribe "American Constitutional Law" (1978) p. 160, n. 8.) An argument for presidential termination of the Mutual Defense Treaty could be solidly based on the language of the *Curtiss-Wright* opinion.

The very next year, again in an opinion by Justice Sutherland, the Court upheld the Litvinov Assignments—an executive agreement settling claims between the U.S. and the U.S.S.R. stemming from the Russian Revolution, growing out of American recognition of the Soviet Government. The agreement was in the form of a letter, and was never submitted to Congress. The "Assignments" affected private property rights and was expressly upheld as being within the power of the Executive. "Governmental power over external affairs is not distributed, but is vested exclusively in the national government. And in respect of what was done here, the Executive had authority to speak as the sole organ of that government. The assignment and the agreements in connection therewith did not, as in the case of treaties, as that term is used in the treaty-making clause of the Constitution, require the advice and consent of the Senate." *United States v. Belmont*, 301 U.S. 324, 330 (1937).

Five years later, in *United States v. Pink*, 315 U.S. 203 (1942) the Supreme Court again upheld the Litvinov Assignments, this time on a question of the extraterritorial effect of the Russian nationalization decrees (the subject of the Assignment). In an opinion by Mr. Justice Douglas, the Court followed the *Belmont* holding, saying in part: "The powers of the President in the conduct of foreign relations included the power, without the consent of the Senate, to determine the public policy of the United States with respect of the Russian nationalization decrees." (at 229) *Curtiss-Wright* was also cited as an authority, with the Presidential power at issue in *Pink* described as a "modest implied power" of the sole organ of the nation in international relations (at 229).

Significant as these cases may be, they are only examples of a consistent interpretive position of the Court. For a more recent example of judicial deference to the Executive, and enforcement of Executive power in a completely different context, there is the recognition of the "Act of State" doctrine as determined by the Executive in *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 768 (1972). Mr. Justice Rehnquist, writing for the majority, said:

"We conclude that where the Executive Branch, charged as it is with primary responsibility for the conduct of foreign affairs, expressly represents to the Court that the act of state would not advance the interests of American foreign policy, that doctrine should not be applied by the courts." (The act of state doctrine, in brief, is the theory under which the Court refuses to hear arguments as to the legality of actions taken by a foreign government within its own borders.)

A thorough exposition of just the views of the Supreme Court on the separation of powers would require a treatise. These cases have been cited because they reveal a new well-established position of the Court. This is not to say that the position is immutable. But the fact is that at this juncture of Constitutional history, these cases are central statements about the power of the President in foreign affairs.

Superficially, the weight of Supreme Court opinion on the question of the termination of treaties is weakened by occasional statements by members of the Court. Though these few statements provide further ammunition for the advocates of the consenting power of the Senate, they have no legal weight, and therefore must be placed in the same category as the observations of other interested parties.

For example, Senator Sumner supported an argument by quoting from the 1796 opinion of Justice Iredell in *Ware v. Hylton*, 3 U.S. (3 Dallas) 199 258 (1796). Justice Iredell wrote what Congress alone had the power to declare whether a treaty is void. This opinion was Justice Iredell's alone because it was actually a reprint of his lower-court opinion, and because seriatum (successive, individual) opinions were still used. His statement therefore is both unnecessary to the holding of the Court and has never been endorsed by a majority. While Justice Iredell was one of the first members of the Supreme Court, it cannot be claimed that his views were "significant", in the sense of representing the views of the Court, in light of the express statements of the Court in more recent cases described above.



Indeed, though *Van der Weyde v. Ocean Transport Co.*, 297 U.S. 114 (1936), is often cited by those insisting upon a mandatory role for the Senate in the termination of treaties, in fact, that opinion expressly refused to reach the question of the authority of the executive to denounce a treaty on its own (at 117). The case does recognize the power of Congress to require the President to interpret whether a treaty is inconsistent with a statute, but this is a truism. Congress had passed inconsistent legislation, and it was up to the President as the sole organ of the nation to communicate his interpretation of the changed state of affairs to Norway, the other party involved.

Another case often referred to is *Clark v. Allen*, 331 U.S. 503 (1947), in which Justice Douglas held for the majority that a 1923 Treaty with Germany (at least the provisions governing the disposition of personal property by German citizens resident in this country) applied to the case, and that the treaty had not been abrogated by the Trading With the Enemy Act. Justice Douglas remanded the case for a determination of the citizenship of the testator. (Other issues were involved in the case, including a California statute, but they are not relevant here.)

In the course of his opinion for the Court, Justice Douglas quoted extensively from an earlier, state court opinion by then Judge Cardozo in *Techt v. Hughes*, 128 N.E. 185, 192 (1920), also involving rights of succession and the effect of war upon treaties. Douglas, quoted Cardozo out of context at one point in his opinion which suggested that the President and Senate together could terminate treaties. This quote has been seized upon by those who approve of the proposition that either the Senate or Congress must participate in the termination of a treaty.

*Clark v. Allen* cannot support this, however, as the important language was dicta to Cardozo's opinion, not to mention Douglas'. Furthermore neither case addressed the question of the President's power to terminate treaties within their terms, which is the question at issue in this problem concerning the Mutual Defense Treaties. Both cases instead were concerned with property rights and state control of those rights in view of certain treaties and international hostilities. The language at issue here (331 U.S. 503, 509) is prefatory to a declaration of great judicial reluctance to "denounce treaties generally". Actually it is merely a list of "denunciatory" powers superior to those of the Court. Cardozo did not discuss, because he did not need to, the distinction between termination and abrogation. It seems fair to say that the denunciation contemplated by Cardozo and assigned by him to the President and Senate, was an act of nullification, not a termination within the terms of the treaty.

In view of the Supreme Court cases cited above, including an opinion written by Justice Douglas in *United States v. Pink*, *Clark v. Allen* cannot fairly be taken to support the conclusion that the President must consult with Congress and obtain legislative approval before terminating a treaty on its own terms.

#### SUMMARY

The 20th century result of the contradiction between a government of limited powers but full sovereignty, described at the outset of this memo, is the near plenary power of the President in foreign affairs. The Constitution permits the acquisition and exercise of this power, and the Supreme Court has accepted it as well. As Justice Jackson pointed out, history and opinion largely serve to cancel each other out, and no consensus view of the separation of powers and the termination of treaties is identifiable.

The termination of the Mutual Defense Treaty with the ROC, and the recognition of the PRC as the government of China are policy questions which can only be finally resolved by the President.<sup>3</sup> The questions involve ones consigned by the Constitution and history to the President. There is no Constitutional mandate to consult Congress as an essential procedural prerequisite before termination. The issue is truly a political one and is subject to the restraints of the political process. But the process is in fact a Constitutional one, even though there are very few actual limits on the give and take between the political branches.

Under the terms of the Mutual Defense Treaty, the President is fully within his powers, explicit, implicit and historically acquired, in giving notice on behalf of the U.S. of an intent to terminate the Treaty. Recognition of the PRC, as that of any other government, is an exclusive function of the Presidency, beyond the

<sup>3</sup> See testimony by Frances Valeo, former Secretary of the Senate, in "Normalization of Relations with the People's Republic of China: Practical Implications," Subcommittee on Asian and Pacific Affairs, U.S. Government Printing Office, 1977, p. 114.

reach of Congress or the Supreme Court. Consequently neither act, termination or recognition, would be an impeachable offense.

#### U.S. PROTECTION OF TAIWAN

Mr. WOLFF. Mr. Holbrooke, since the United States has acknowledged the Chinese position that Taiwan is a part of China, in effect recognizing that the Taiwan issue is an internal matter with China, on what legal basis could the United States at a future date move militarily to protect Taiwan? Wouldn't such an American military action be regarded by the world community, by international law, for that matter, in fact, as an intervention into the internal affairs of another country?

Mr. HOLBROOKE. I think the United States can and should act in accordance with its own national interests as determined by the President in accordance with constitutional procedures. If that were to include the contingency you outline, Mr. Chairman, and the United States felt it had to act, and this was done in the appropriate constitutional manner, I think we should do so, regardless of other factors that may apply.

There will always be some international opposition in some quarter to any action that any great nation takes.

Mr. WOLFF. I should like to have remarks of counsel at this point as to what international law would be regarding this?

#### U.S. LEGAL POSITION

Mr. MARKS. Mr. Chairman, I think first, you have to start with the proposition this is a somewhat unique situation. As you know, international law has a concern in general with peace and stability, and not every activity that deals with the domestic affairs of a state is free from any international law implications.

I think that in the unique circumstances we have here, if there were a use of force by the People's Republic of China involving Taiwan, and as both Secretary Armacost and Secretary Holbrooke have said, we regard that as extremely unlikely, but nonetheless, if there were, it would be inconsistent with an essential element of normalization and it would also constitute a very serious threat to the international peace and stability of that region of the world.

I think under those circumstances, under international law, we would indeed be justified in responding in the manner in which Secretary Holbrooke has described.

Mr. WOLFF. Is not the situation in someplace like Iran analogous?

Mr. MARKS. I do not think so. With all respect, I think this situation is unique. I don't think you can look at another country like Iran and draw analogies to the relationship between Taiwan and the mainland.

#### ECONOMIC LEGAL CONCERNS

Mr. WOLFF. Let's get to the economic side of this picture for a moment.

With your permission, Mr. Secretary, I am going to ask counsel some questions here.



The Republic of China is the guarantor of several billion dollars of loans by U.S. banks, all loan agreements contemplating suit against the Republic of China in Federal Court. There is a serious question whether or not the courts will permit the Republic of China or Taiwan to appear, lest appearance by an unrecognized government would be inconsistent with foreign policy.

Now, how do we solve that?

Mr. MARKS. With all due respect, I don't believe there is a serious question even now. In any event, upon passage of the omnibus legislation the question will be moot. The only doctrine that would affect the ability of the people on Taiwan, the Republic of China as guarantor, to sue or be sued in all courts would be the doctrine that an unrecognized government may not be a plaintiff in our courts.

As you know, the omnibus legislation submitted by the administration specifically states that recognition as a condition with respect to U.S. law will not be applicable in the case of Taiwan. So that there is no question in our mind that at least after the passage of the omnibus legislation there would be no barrier whatever to Taiwan's suing or being sued in the courts of the United States.

Mr. WOLFF. There is a serious question now as to the embassy Taiwan maintains here, as to the rights and title to the building and grounds. The question has been raised relative to the fact that this embassy was owned by the prior Government, prior to the present Taiwan Government.

Now, there are funds on deposit throughout the United States and throughout the world. I guess, some of these funds were put on deposit prior to the present Government of Taiwan being in existence. How do you segregate the funds and how do you protect those funds from being expropriated or taken over by the People's Republic of China?

Mr. MARKS. I would like to separate out some of those questions, if I can, Mr. Chairman.

We draw a distinction between the diplomatic properties; namely, Twin Oaks, the Chancery, that sort of thing, on the one hand, and foreign exchange assets, the bank deposits, on the other. With respect to the foreign exchange assets, the bank deposits, these are the products of the economic development of Taiwan over the last decade.

#### PROTECTION FOR TAIWAN

The President has said that as part of our policy we will continue to maintain commercial relationships between the people on Taiwan, and obviously you cannot do that without banking relationships. It is our view, the State Department view, the Legal Adviser's Office view, that the normalization of relationships with the People's Republic of China should not and does not affect the ownership of the foreign exchange assets presently on deposit with U.S. banks.

Moreover, under both the President's memorandum and under the omnibus legislation the people on Taiwan continue to be treated as a country, nation, state, whatever, under U.S. law. We believe that those assets would still continue to be subject to the safeguards and protections of the Foreign Sovereignty Immunity Act, which, as you know, bars attachment or execution except under the most narrowly defined circumstances, which would not be present in this case.

## FUTURE PROBLEMS FORESEEN

Mr. WOLFF. I get more confused as time goes on. I am sure the American people are confused at this point. Some of the determinations that are being made, though they are unique, as you have indicated, bring us back to what I said before, if you will forgive the idea of taking us back to the "double speak."

I don't understand how we talk about it as a country in one place, but in another place we don't talk about it as a country.

I find that is the most difficult part of it, I don't think we are going to be in a problem today on the question of Taiwan, and the People's Republic of China, or China, but I think down the road you are actually creating a tremendous number of problems that must be resolved.

We have problems in the Middle East over two words right now, "the" and "all."

My interpretation if you just look at this, you are going to have, unfortunately, great difficulty, sir, I believe in resolving these problems. I think the omnibus bill represents a noble desire; I would like to see all of the problems go away, but I think that we are taking an "Alice in Wonderland" view of this, and just blotting out those problems and putting them off to some other day. That is the problem that I see. I don't think that we in the Congress can afford to take that type of risk, whether it be 1 billion people or 17 million people. I think that is the problem that exists, the underlying problem that exists in all of this.

I do think that there are so many things that have to be resolved. I would ask the Secretary one final question:

Do you anticipate that this omnibus legislation is going to cover everything, or do you expect to come before us for additional legislation?

Mr. HOLBROOKE. In regard to authority to conduct relations with Taiwan, as they were conducted prior to the termination of state-to-state relations, we believe that this bill is all we are going to need. To research this bill we canvassed every agency of the U.S. Government, an enormously complex and time-consuming effort. Every agency was satisfied that its relationships with Taiwan and its needs in terms of personnel, were met.

Mr. WOLFF. The only people that haven't been satisfied are the Congress?

Mr. HOLBROOKE. That is why we are here, Mr. Chairman, to satisfy you as well. But I do not see in this bill problems in the field that you are now addressing. I understand your concerns in regard to some of the questions but nobody has expressed a serious problem concerning the actual ability under this bill to continue people-to-people relations with Taiwan.

Mr. WOLFF. My time has again expired.

Mr. Mica.

## PEOPLE'S REPUBLIC OF CHINA

Mr. MICA. Thank you, Mr. Chairman. Just a few questions which I would like to get on the record for my own information.



After this omnibus legislation is passed, will the Congress be approached to support legislation funding for loans or programs for the People's Republic of China?

Mr. HOLBROOKE. We will be asking you over the next few years for normal authority regarding our relationships with the People's Republic of China; that is correct.

Mr. MICA. Normal authority means that you would be coming and asking for certain credits and so on with regard to sales?

#### MFN STATUS

Mr. HOLBROOKE. At this point, we will not do any of that because China is not yet eligible for MFN; it is not eligible for Eximbank credits. We have the claims assets issue hanging over our head. As time goes by and all these matters, that I referred to in answering Mr. Solarz's question earlier, are resolved, I would expect we would ask you for normal authority vis-a-vis China just as we do for other countries.

Mr. MICA. Am I to understand all claim disputes will be settled before?

Mr. HOLBROOKE. It is our judgment that it is really virtually a prerequisite to many other aspects of commercial relations, particularly those involving Eximbank and other things which require governmental approval.

Mr. MICA. What type of trade status do you envision? Would this be normal trade status, or as we call it, most-favored-nation trade status?

Mr. HOLBROOKE. We are examining that question in great detail now and are in extensive consultations with both Houses on that issue, on how to approach it. I would hope that in time—and I can't give you a projection as to how long that would take—we would find ways to extend MFN to the People's Republic of China, and under the provisions of the law, to other nonmarket economies.

#### MILITARY QUESTIONS

Mr. MICA. At any time has any discussion taken place with regard to mutual military agreements, or defense, or sales, or—

Mr. HOLBROOKE. No.

Mr. MICA [continuing]. Cooperation?

Mr. HOLBROOKE. We have told the Chinese that we will not sell them military equipment, just as we will not sell it to the Soviet Union. We have discussed with the Chinese the establishment of normal Embassies in both Peking and Washington. Those involve military attachés. Military attachés were not part of the liaison office. I would think in time, in the not too distant future, that would occur.

We also had preliminary and formal discussions with them over other kinds of rather routine liaison. For example, our National Defense University, which travels around the world, might in time make a field trip to China. We would eventually assume we would see in a routine way Chinese military personnel visiting the States in just the way that personnel from almost every other country in the world, certainly almost every one we have diplomatic relations with does.

But none of the more high-level issues with strategic implications, which I assume are the real points of your question, have been discussed.

Mr. MICA. They have not been discussed?

Mr. HOLBROOKE. No, sir.

#### PRC PUBLIC OPINION

Mr. MICA. Let me ask you this. It was mentioned earlier the situation in Iran and further mentioned it was not at all analogous. Your comment was made that we have dealt with the leaders of the Government of the People's Republic of China. Has an assessment been made of the general sentiment, if possible, of the people? I give as an example, we had all the assurances in the world from the Shah and the government leaders of continued support and cooperation and continuance of the Government in Iran, but it wasn't the sentiment and it is obvious it was not the sentiment of a great majority of the people in Iran to continue under a goal that was set for it.

Has there been any assessment made as to whether or not the Government does in fact have any kind of support from the general population, or do we care?

Mr. HOLBROOKE. Very, very limited. Our sources of information are very limited. It is a country of 900 million people, and the official American presence is limited to something like 30 or 40. We had very constrained contacts prior to normalization.

What is very significant, getting back again to Mr. Solarz' question, is the rapid expansion of contacts with the Chinese people which has been allowed us in the 2 months since normalization. We have now agreed to establish consulates in Shanghai and Canton. This will for the first time give us a permanent presence in those two cities, with greater access to the people, the views of the people of China.

Having said that, our information is very limited. What information has been available, however, has shown that every Chinese who comes in contact with Americans, either businessmen, journalists, or American officials in recent weeks, in Peking, Shanghai, and Canton, has been absolutely euphoric over the decision. They view it as an historic event in their lives and they all see it as a significant and favorable augury.

Mr. MICA. Where do you get the information that all of the Chinese are euphoric?

Mr. HOLBROOKE. I said the ones we have been in contact with. I want to stress that.

Mr. MICA. Through the State Department?

Mr. HOLBROOKE. Your colleagues who were in China at the time of normalization, I think, would make similar comments. Journalists, delegations that have visited, have all remarked on the tremendous warmth of the Chinese people toward Americans since the announcement, and if you put it all together, you have a very perceptible and measurable improvement in the attitudes toward the United States by the Chinese with whom we and other Americans have been in contact.

You are talking about a country of 1 billion people. The number of Chinese who have been in contact with Americans in the last 8 weeks



number in the few thousands. So it is not what I would call a huge data base, and it is almost entirely in the cities, and it is still quite controlled, but against the previous form of relationships, the warmth has been perceptibly greater and very encouraging.

#### TAIWAN PUBLIC OPINION

Mr. MICA. What about the same with regard to the people on Taiwan?

Mr. HOLBROOKE. The people on Taiwan have tended to take Americans aside and say in effect to them, we still like Americans but we aren't very happy with your Government. I think that would be a gentle way of putting the reaction that we have heard.

Mr. MICA. I might say one of the reasons I questioned some of the comments we are getting about reactions is the experience we had. Mr. Christopher, I believe, was here last week, here before the full committee, and he said there was worldwide support of our actions with regard to normalization in the handling of Taiwan, but this full committee had the European Parliament here, within the last 10 days, and members I discussed this with, a half dozen members, and everyone that I discussed it with said that they were very concerned, and the feeling in Europe was very disconcerting with the way we handled this situation, that in fact the comment was made to me, that it points out that Taiwan didn't do anything to incur our disfavor and we disregard them and, therefore, we can't trust Americans. It concerns me.

Mr. HOLBROOKE. Every man or woman you talk to from the European Parliament is a citizen of a nation which had long since done what we did. I am not clear from your statement whether they were objecting to what we did or to the way we did it or when we did it. The statements, however, from leaders around the world, with certain notable exceptions, have been very positive.

Mr. MICA. I don't think, at least in the discussions that I had, there is much objection with moving forward to recognizing China, I think the great concern in the Congress, in my opinion, is with regard to how it was handled and how we handled it with Taiwan.

Mr. WOLFF. Mr. Findley is not a member of this subcommittee but a member of the full committee.

#### U.S. OBLIGATIONS TO TAIWAN IN FUTURE

Mr. FINDLEY. Thank you, Mr. Chairman.

Mr. Secretary, the clock has begun to run on the termination of the Mutual Defense Treaty. I don't need this answer at the present time, but I hope before our markup Friday we could have the opinion of the Legal Adviser as to whether the Mutual Defense Treaty would obligate the United States to act in the event of rebellion on Taiwan, or guerrilla action. It is somewhat ambiguous, it says recognizes armed attack directed against the territory—directed. Would guerrilla action or rebellion be in that realm or not? Perhaps you would like to comment now?

Mr. HOLBROOKE. You are talking about in the remainder of calendar 1979?

Mr. FINDLEY. That is correct.

Mr. HOLBROOKE. I think it would be easy just to say no, it would not require, and that is my instinctive reaction, Mr. Findley. However, there is always the possibility that guerrillas might in a very hypothetical sense be viewed as externally directed or externally infiltrated, and under that contingency one would have to examine whether the treaty applied.

Mr. FINDLEY. Thank you.

Mr. HOLBROOKE. The treaty was not intended nor does it cover, most of the things I would infer from your question.

Mr. FINDLEY. My concern over policy statements by the Congress, which become law, relates not to the immediate period, this year, that is about to elapse, nor during the Presidency of Jimmy Carter. I don't see any inclination on his part to use military force in an adventurous way in regard to Taiwan, but if House Joint Resolution 167 does become a statute in some form or another, it presumably would still remain as the stated policy of the United States at the expiration of this 1-year period that is now about to elapse.

In regard to that, as I understand your words, you said that you found nothing inconsistent in this resolution with the process of normalization. You would welcome the opportunity, if this committee deemed it desirable, to have something of this sort in the statute, and that you would be glad to work with them along these lines, as I recall your words.

Does the President find useful a statement of policy which would authorize him to act with or without armed forces to defend Taiwan?

Mr. HOLBROOKE. Does he find it useful?

Mr. WOLFF. Would you repeat that?

#### NEED FOR CONGRESSIONAL ACTION

Mr. FINDLEY. Does the President find it desirable for the Congress to enact a resolution or bill which would authorize him to use U.S. Armed Forces, or to otherwise act, to defend the peace of Taiwan?

Mr. HOLBROOKE. The President has stated that he believes that on the basis of the negotiations and discussions between us and the Chinese such legislation is not necessary.

Mr. FINDLEY. May I conclude, then, he doesn't deem it desirable?

Mr. HOLBROOKE. I would prefer to stick to my statement, Mr. Findley, because I have a certain feeling that the Congress does wish to make its views known on this point. If that is the case, our greatest concern is that this be expressed in a way that is not inconsistent with the facts of normalization. So that is our primary concern at this point.

Mr. FINDLEY. Several things strike me rather dramatically about House Joint Resolution 167. One is the absence of any phrase such as appeared in the war powers resolution—I don't recall the exact words—but to the effect that nothing in this legislation can be construed as granting to the President authority that he would not have in the absence of this.

I don't see that in this legislation nor do I see any limitation as to the form of action which may occur.



## HOUSE JOINT RESOLUTION 167 INTENTIONS

Mr. WOLFF. If the gentleman would yield at this point, it is quite obvious the gentleman hasn't read the whole resolution. It says the President has to act within the constitutional process, which takes into consideration all of the past legislation and takes into consideration the very fine work that the gentleman did on the war powers legislation as a sponsor of that resolution.

So, therefore, the limitations are very clearly within the resolution, the President cannot act out of scope of the authority that has already been granted to him. It grants no new authority to the President.

I spoke to the President about this. If the President thought this exceeded the authority which he now has and was inimical to the very basic process of normalization, as he understands it, with the Chinese, he would oppose it. He has indicated that he does not oppose this legislation, he does not think it is necessary, and contrary to the fact that the gentlemen would like to put words in the mouth of the Assistant Secretary of State, it is not a question that he does not desire it.

Mr. FINDLEY. Mr. Secretary, section 2 of this resolution declares it is the policy of the United States to act. Now, the form of action is left open—"To meet any danger to the peace of Taiwan." I am skipping phrases, but those are—

Mr. WOLFF. Would the gentleman yield further?

Mr. FINDLEY. May I finish one sentence?

Mr. WOLFF. You didn't finish the sentence. That is the part you are deleting there and taking things out of context.

Mr. FINDLEY. You have before you the full text of the resolution, the key words.

Mr. WOLFF. Since this is a meeting of this subcommittee, the gentleman was being granted the opportunity of questioning the witness, he will abide by the rules of the committee. The Chair's ruling on this at this point is that the entire statement be read and not taken out of context. That is part of the problem the gentleman has raised before.

Mr. FINDLEY. That is an extraordinary ruling of the Chair but I have no desire—

Mr. WOLFF. As long as I sit in the Chair that is the ruling of the Chair. If the gentleman doesn't like it—

Mr. FINDLEY. When you appear before subcommittees, I am sure you will be allowed a considerable latitude.

The language in section 2 reads, "The Congress finds and declares it is the policy of the United States to act in accordance with constitutional processes and procedures established by law to meet any danger described under section 1, and otherwise to safeguard the interests, concerns, expectations of the United States."

Of course, section 1 then relates to any danger to the peace, prosperity, and welfare of Taiwan.

Mr. WOLFF. The Chair must rule again that the gentleman is reading out of context. It does not say the peace and welfare or the prosperity of Taiwan; it states specifically to the interests, concerns, and expectations of the United States, not in the peace, prosperity, and welfare of Taiwan.

Mr. FINDLEY. Mr. Chairman, the paraphrase I made is an accurate reflection of the effect of the language, but I am glad to have him read the full sentence into the record.

#### PRESIDENT'S DESIRES SOUGHT

My question, Mr. Secretary: Would it not be preferable for the resolution to require instead that the President recommend an appropriate course of action to the Congress in the event that he saw a threat to the peace of Taiwan, and then the Congress could act upon the recommendation by constitutional process?

Mr. HOLBROOKE. Mr. Findley, I don't mean to evade your question but we are dealing in an area of such nuances I would want to reserve judgment until I saw actual language. I do not at this point, reading sections 1 and 2 of the resolution—I do not see any significant difference between what you were saying in the outline you have just put forward, and what is referred to here.

Mr. FINDLEY. Section 1 does direct the President to inform the Congress of any danger and so on. My suggestion as an amendment to section 2 would be that the President also be directed to make recommendations to the Congress in the event that he did see a danger to the peace of Taiwan; recommend an appropriate course of action, if he deemed such to be desirable, instead of stating as policy that the United States shall act to meet any dangers and so on.

#### NO REQUIRED ACTIONS

Mr. HOLBROOKE. Once again, Mr. Findley, I am not clear in the absence of specific language what the significance of the difference that you mention would mean, but it does seem to me that section 2 as now written provides a clear process for action which involves the Congress and follows the law and the Constitution and at the same time does not put us in a situation in which automaticity is required. I think automaticity is something neither—

Mr. FINDLEY. Does not require automaticity?

Mr. HOLBROOKE. I think automaticity would be something neither branch I hope would look on as necessary.

Mr. WOLFF. The gentleman's time has expired.

Mr. FINDLEY. Could I have 30 seconds?

Mr. WOLFF. Yes; go ahead.

Mr. FINDLEY. Mr. Secretary, even though it does not require automaticity, the existence of this language surely would be viewed by an adventurous President as strengthening a course of military action if he had the will to pursue that course of action.

Mr. HOLBROOKE. I do believe the question of the actions of what you term an "adventurous President" must be viewed only in the context of overall legislative-executive branch relations. At whatever future time, that clearly is not going to happen under the administration of President Carter; and as Chairman Wolff has said, the war powers bill plus, I think, a very important history going back to August 1964, in this issue, should preclude that.

Mr. FINDLEY. We have to look to the future with great caution.



Mr. HOLBROOKE. I would like to say in closing, if I might, Mr. Chairman, that I think the caveats taken here are reasonable ones and ones which I hope will be reflected by other people, too.

Mr. WOLFF. I just might read back to you, the gentleman from Illinois, the statement he made on October 12, 1973, when he said in the war powers debate:

I think it is a well-established principle of law and constitutional procedures that the concurrence of Congress is required in order to settle the legality of any question of public policy, whether it relates to the introduction of military forces or otherwise.

Mr. FINDLEY. A very sound statement.

Mr. WOLFF. I also think it is a very sound statement. I wish the gentleman would review it once again.

Mr. Solarz.

#### BOYCOTT PROVISIONS

Mr. SOLARZ. Mr. Chairman, I think that when I start attending hearings where the witnesses refer to the previous statements of the chairman, and the chairman refers to the previous statement 5 years ago of the other members of the committee, that I may have been around too long. I just hope that in the same way that we would like the problem of Taiwan to be resolved by agreement on the part of Chinese on both sides of the Taiwan Strait, we can come out of this committee with a resolution which is acceptable to members on both sides of the political strait which divides this committee.

I have a couple of questions I would like to ask the Secretary.

I would like to clarify your position with respect to the applicability of existing antiboycott legislation to Taiwan.

Is it your testimony that the amendments to the Export Administration Act that were adopted 2 years ago prohibiting American citizens and corporations from cooperating with secondary and tertiary boycotts by foreign countries against other foreign countries, which are not themselves an objective of an American boycott, would be applicable to any effort in the future on the part of the People's Republic of China to impose secondary or tertiary boycotts on American citizens and corporations with respect to their trade with Taiwan?

Mr. HOLBROOKE. My answer is yes, and it would be a much clearer and unequivocal answer if the omnibus bill passes. But the answer is yes.

Mr. SOLARZ. We are going to take a close look at that existing legislation. If there was any doubt whatsoever about that, I assume in principle you wouldn't object to an explicit reference in the omnibus legislation to the relevant language of the Export Administration Act making it clear that it did apply?

Mr. MARKS. Let me say I think the way to deal with that, if you had the slightest doubt, would be to do it in the legislative history rather than the language of the statute. The reason I say that is, obviously, there are a great many statutes which could raise a similar doubt, if you found one there, and if you do one and not the rest, you are making implications about the rest, and if you do all of them, we have an unmanageable bill.

#### ASSURANCES NEEDED IN BILL

Mr. SOLARZ. First of all, we could put language in the committee report making it clear that any explicit reference to the antiboycott

provision of the Export Administration Act did not mean to suggest that other more ambitious provisions of the law were not applicable also. This is a particular problem and I think it is important for us to have some assurances that American firms would not be able to participate in the secondary or tertiary boycott of Taiwan without violating the law.

You may be right, and no such reference is needed, but it is a delicate point and—

Mr. MARKS. Maybe we can work with the staff on that.

Mr. SOLARZ. I would hope if it turns out there is any real ambiguity, you wouldn't object to an explicit reference.

#### SUGGESTED ANTIBOYCOTT AMENDMENT

I have some language here which some of us thought might be added to the language of the Kennedy-Wolff-Cranston-Solarz-et al. resolution. I wonder, Secretary Holbrooke, if you could let us know whether in your judgment this language would be incompatible with normalization, not necessarily whether you think its inclusion is desirable, but whether ipso facto its inclusion would obstruct the normalization process?

On page 2 of the resolution, it says, "Whereas the United States"—well—the last whereas clause, where it says: "Whereas the United States recognizes an armed attack directed against Taiwan would represent a danger to the stability and peace of the area"—would you have a problem with the inclusion of the language whereas the United States recognizes an armed attack directed against Taiwan, now the language—quote "Or any effort to prevent Taiwan by military force from engaging in trade with the people of other nations." Would the inclusion of that reference create a problem?

Mr. HOLBROOKE. Mr. Solarz, I would really prefer to study the language carefully and continue the discussion with you outside the hearing, because I really would want to examine it carefully. You are asking questions with very long-term implications and I would feel uncomfortable trying to make a judgment off the basis of a first or second reading.

Mr. SOLARZ. What I am trying to get across here, I was under the impression you didn't have a problem with it in terms of its implications for normalization of some references in the resolution indicating we are opposed not only to an armed attack against Taiwan but to in effect the blockade against Taiwan?

Mr. HOLBROOKE. That concept does not cause me a problem as long as it is phrased in a way—I hesitate to give you a quick response—as long as it is phrased in a way that is not inconsistent with the agreements with the People's Republic of China.

#### DEFENSIVE ARMS

Mr. SOLARZ. Mr. Secretary, in section 2 of the resolving clause, would you have any problem in principle where we say the Congress finds it is the policy of the United States to act in accordance with constitutional process and procedures established by law to meet any danger described under section 1, adding the following phrase, "including but



not necessarily limited to the provision of arms of a defensive character."

Mr. HOLBROOKE. I am not authorized to speak for the administration on language changes across the board at this point, Mr. Solarz, but I think the intent there sounds to me to be consistent with the previously stressed statement by the President and Secretary of State, the Secretary of Defense, and others.

Mr. SOLARZ. Just two more questions. Mr. Secretary, you indicated in response to a question by Mr. Mica that with notable exceptions all the other countries in the world were remarkably enthusiastic about normalization. What were the notable exceptions?

Mr. HOLBROOKE. I think Taiwan was a notable exception. [Laughter.]

Mr. SOLARZ. Were there any other notable exceptions?

#### ISRAELI CONCERNS

Mr. HOLBROOKE. I regret to say there are some negative expressions on the action coming from Israel, which I find personally very distressing, because I think they are based on a misconception and misperception of the relationships which I do not believe exist between the two issues. I also think, as Mr. Mica did correctly indicate, within individual countries there were people who had some concerns, but I was particularly struck by the positive statements from Korea, Japan, and Australia, countries which had all in the past expressed—

Mr. SOLARZ. From government spokesmen themselves?

Mr. HOLBROOKE. No official criticisms.

Mr. SOLARZ. Other than Israel and Taiwan and presumably the Soviet Union, did they express negative noises?

Mr. HOLBROOKE. No; they did not. I think there may have been some concern and reserve expressed in Saudi Arabia.

Mr. SOLARZ. South Korea?

#### POSITIVE REACTIONS

Mr. HOLBROOKE. No; that was a very significant area of positive statement. South Korea, Japan, and Australia, three countries which had long urged caution and going slow, Mr. Solarz, all were extremely pleased with the timing and the way it was done and I consider that is very important.

Mr. SOLARZ. My last question has to do with this article that came out a few days ago indicating in the course of the negotiations we apparently neglected at any point to ask the Chinese for some formal assurances that they would not use force to resolve problems, and I frankly was somewhat surprised we had neglected to do that. Was that article accurate and, if so, why did we refrain in asking that?

#### NO EXPLICIT PLEDGE SOUGHT

Mr. HOLBROOKE. We did not neglect to ask them. We believe from the outset that the question of peaceful settlement of the Taiwan issue was central. We also believed we could not get, it was impossible, and unwise to seek an explicit statement of nonuse of force in regard to matters which were at the same time explicitly recognized as an internal Chinese affair.

We made absolutely clear to the Chinese we could not proceed if they were to contradict us or act or behave or say anything which appeared to lessen the chances of peaceful settlement. So, I think there has been a slight misimpression created on this issue.

Mr. SOLARZ. I don't want to take up more time; I will debate the issue elsewhere, but I appreciate your yielding me a few extra minutes.

Mr. WOLFF. Mr. Pritchard.

#### MFN REQUIREMENTS AND SOVIET RESPONSE

Mr. PRITCHARD. One question, Mr. Secretary.

You are hoping that we will be able to get most-favored-nation status for People's Republic of China, are you not?

Mr. HOLBROOKE. Ultimately; yes, sir.

Mr. PRITCHARD. When you say ultimately, you think that is going to take some time?

Mr. HOLBROOKE. I think there are certain prior steps which are required involving a law, and involving the claims assets issue, and involving perhaps the question of treatment of other nonmarket economies in regard to the same issue.

Mr. PRITCHARD. Would you think it wise if we were to give this status to China and not at the same time give it to Russia?

Mr. HOLBROOKE. I think that is a very difficult question, Mr. Pritchard, and one which is very much at the center of the reason that I do not give you an absolutely clearcut answer. We are in the process of intensive consultations with both Houses of Congress on that issue, and we are also, of course, examining the law, the Jackson-Vanik amendment, very carefully, to see how it applies to each of the two countries.

Mr. PRITCHARD. It would seem to me, Mr. Secretary, that you want to be evenhanded.

Mr. HOLBROOKE. I know your comment and I will relay that to the Secretary of State because I think he is interested in the views of as many Members of Congress as wish to express them on this point.

Mr. PRITCHARD. I have no further questions.

#### DENG QUOTED ON TAIWAN

Mr. WOLFF. I just would like to make note on the questions that have been going back and forth here, relative to the peaceful settlement, that I think one of the most significant statements that was made by Vice Premier Deng was the statement that he made to our delegation, back in July. During our meeting in Peking, he noted the fact that they had had cooperation between the Kuomintang and the Chinese Communist Party twice before. The one point that Deng made at that time, which gave all of us hope that there could be a final solution to this problem, was the statement that he made that: "We have often said to the Americans in our effort to settle the Taiwan issue and reunify the motherland, we will respect realities and we can be flexible in the matter of settlement." I think this was a significant statement.

Mr. HOLBROOKE. Mr. Chairman, may I second your comment and add to it the fact, which we have already communicated to you in a letter, I believe, that in the very critical meeting on September 9, be-



tween President Carter and the Chinese Ambassador in Washington, when the President made reference to the importance of the peaceful settlement issue, Ambassador Chai specifically drew our attention to that particular colloquy between Deng Xiaoping and yourself as being of particular significance.

This, of course, sent us all back to our files to study, and we well understood.

Mr. WOLFF. It gave you the opportunity to read what we had sent over to you previously, when we consulted with you?

Mr. HOLBROOKE. That is correct. [Laughter.]

#### U.S. USE OF FORCE

Mr. MICA. If I may just for personal information ask if we can get a comment from you or possibly a followup later in writing. This issue that has been raised by my colleague, Mr. Findley, keeps coming up, and I thought it was put to rest once already; maybe I misunderstood this.

That the President said when we met with him, Mr. Chairman, that with or without this resolution, there are specific steps that he must take with regard to the declaration of war, or commitment of troops, and that this resolution had no bearing on those steps. Is that correct or not?

Mr. HOLBROOKE. Any use of American forces must be done in accordance with the law and the Constitution.

Mr. MICA. Does this resolution in any way change that?

Mr. HOLBROOKE. This resolution is subject to the war powers bill, and there is just no question about that.

Mr. MICA. I am glad it is in the record.

Mr. WOLFF. I am happy that you understand that. I am sorry Mr. Findley is not here so he could understand it.

Mr. MICA. Thank you.

Mr. WOLFF. If there are no further questions, we thank you very much for coming before us. You certainly have cleared up a lot of questions that we had.

I must say that the Congress, I think, is virtually unanimous in looking toward further steps in the normalization process with the People's Republic of China, and that it is in the interest of all to proceed at as rapid a pace as possible. Notwithstanding that fact, however, you, I am sure, are mindful of the concerns of the Congress regarding not the question of Taiwan, but the 17 million people who reside there.

Mr. HOLBROOKE. We share those concerns, Mr. Chairman.

Mr. WOLFF. Thank you very much. The subcommittee stands adjourned.

[Whereupon, at 4:45 p.m., the subcommittee was adjourned, subject to the call of the Chair.]

## IMPLEMENTATION OF TAIWAN RELATIONS ACT: ISSUES AND CONCERNS

THURSDAY, FEBRUARY 15, 1979

HOUSE OF REPRESENTATIVES,  
COMMITTEE ON FOREIGN AFFAIRS,  
SUBCOMMITTEE ON ASIAN AND PACIFIC AFFAIRS,  
*Washington, D.C.*

The subcommittee met at 1 p.m. in room 2172, Rayburn House Office Building, Hon. Lester L. Wolff (chairman of the subcommittee) presiding.

Mr. WOLFF. Good afternoon. Thank you for attending.

Today is the second day of our scheduled series of hearings on U.S. China policy, what it is, how we arrived at this point, and where we go from here.

Yesterday we heard from the administration, with the testimony of Hon. Richard Holbrooke, Assistant Secretary of State for East Asia; and Michael Armacost, Deputy Assistant Secretary for Defense for East Asia.

Our focus then, as now, was on the administration's requested "omnibus bill," H.R. 1614, to facilitate a continued U.S. relationship with the people of Taiwan; and on the Kennedy-Wolff bill, House Joint Resolution 167, which would mandate a continued U.S. interest in the security of Taiwan.

Today we are pleased to welcome as witnesses before the subcommittee Hon. Jim Leach, who will introduce the following witness, Dr. Peng Ming-Min, a former adviser to the Nationalist Chinese delegation to the United Nations; a distinguished scholar at Taiwan University, the University of Michigan, and Wright State University; and who is presently the director of the Taiwanese-American Society.

At 2 p.m., we are scheduled to hear from Winston Lord, now president of the Council on Foreign Relations, and the former Chief of the Policy Planning Staff at the Department of State under Dr. Kissinger during the time of the opening to China in 1972.

Following that, we are scheduled to hear from Hon. Walter P. McCaughy, former U.S. Ambassador to Taiwan from 1966 to 1974. At 4:30 this afternoon, we had been scheduled to hear from Adm. Noel Gayler, former Commander in Chief of the Pacific Fleet, to discuss a study that he has recently completed on the strategic situation in the region. But due to the inclement weather, I do not think the subcommittee will stay in session until that hour. So, without objection, we will include Admiral Gayler's statement in the record, with our sincere thanks for his efforts on our behalf.



## ADMINISTRATION VIEWS ON HOUSE JOINT RESOLUTION 167

Before we begin, I should note that at yesterday's hearing, Secretary Holbrooke indicated that while the administration still considers House Joint Resolution 167 on Taiwan's security to be unnecessary, the administration is ready to work with the Congress in developing language which does not contradict with what has already been agreed to as the normalization formula.

We had hoped today to hear from Mr. Robert Parker of the American Chamber of Commerce in Taipei. Unfortunately, Mr. Parker had to return to Taipei on business. However, he has submitted a formal statement for the record, and without objection it will appear in the record following the testimony of our colleague from Iowa and Dr. Peng.

We are also in receipt of a letter from the distinguished sinologist, John K. Fairbank of Harvard. Professor Fairbank strongly endorses the normalization decision, and without objection, his letter will be placed in the record at this point.

[The letter referred to follows:]

HARVARD UNIVERSITY,  
Cambridge, Mass., February 14, 1979.

HON. LESTER L. WOLFF,  
Asian Subcommittee, Foreign Affairs Committee, U.S. House of Representatives,  
Washington, D.C.

DEAR MR. WOLFF: The historic importance of the current discussion of China policy leads me to offer some points that seem under-represented, even unknown, among otherwise well-informed citizens.

1. The growing nationalism among one billion Chinese is the biggest political force in Asia. It focuses on national unity expressed as "One China." This sentiment is so universal that Chiang Kai-shek and Mao Tse-tung agreed on it. American policy should not confront or deny it.

2. Thus the issue over Taiwan has not been independence (unity or disunity). The issue has been which party should rule the One China. For thirty years we supported the defeated claimant. Gradually the rest of the world accepted the Chinese Communist Party's victory of 1949. The Kuomintang on Taiwan never asked us to support Taiwan's independence. They wanted us to support their claim still to be the one and only China. They refused to discuss alternatives such as we have now worked out for them.

3. Fortunately, we have now got the best possible solution for Taiwan, far better than most of us in the China field had dared hope for. The key is the American determination to keep Taiwan supplied with defensive arms, which Peking tacitly accepted during the negotiations and cannot now prevent in any case.

Behind this lies the one great fact about Taiwan as a province of China—it is the only province completely surrounded by water and therefore susceptible (more than Vietnam or even South Korea) to our naval influence.

In sum, since Peking now has latent sovereignty, we need not confront Chinese nationalism. Since Taiwan will be defensible, we have not "abandoned" it.

This will go down in the history books as a great diplomatic achievement.

Sincerely,

JOHN K. FAIRBANK,  
Francis Lee Higginson Professor of History, Emeritus.

MR. WOLFF. I would like to take the opportunity at this moment, before I ask our witnesses to testify, to say a word about a very dear friend, Ambassador Dubs who was killed recently in Afghanistan.

## TRIBUTE TO ADOLPH DUBS

Spike Dubs was a dedicated public servant. He traveled with this committee to various areas of the world when he was the Deputy

Assistant Secretary of State for the Near East and South Asian Affairs. I think his death at the hand of the people there in Afghanistan is evidence of a very grievous situation throughout the world, where terror takes the place of law, and becomes the *modus vivendi* of people to achieve their desires.

I think it is a great tragedy for the world that we continue to allow this kind of wanton terror to prevail over authority and over the normal processes which exist for the achieving of various political aims.

This committee would like to offer the members of this committee the opportunity of joining in a small tribute to the memory of Spike Dubs, a friend of this subcommittee, and a dear personal friend to many of us. I would like, without objection, that a letter of condolence be sent to his widow.

Mr. PRITCHARD. I would join in that, Mr. Chairman.

Mr. WOLFF. Thank you.

We will follow on now to the business at hand, and extend a welcome to our colleague, Jim Leach, whom we met in Bangkok on our last trip.

I would like to say that the committee welcomes the opportunity of having you appear before us. Will you please proceed.

#### STATEMENT OF HON. JIM LEACH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF IOWA

Mr. LEACH. Before beginning, I would like to add my expression and approval to what you have just said about Mr. Dubs. Having served in the U.S. Foreign Service, in fact, having worked briefly under Mr. Dubs at the Soviet desk, I can attest firsthand to the enormous respect with which he was held and the fine manner in which his work was always handled, and the reputation that he established in the Department of State.

His death is very tragic. He symbolized probably the best of the United States Foreign Service.

I would also like to note that having participated in the press conference with the chairman in Bangkok, I am certainly impressed by the high regard with which he is held in many parts of the world, outside the realm of this Congress.

Mr. WOLFF. There are some places which do not hold me in such high regard.

Mr. LEACH. In any event, Mr. Chairman, I would like at the outset to express my support for the President's decision to normalize our relations with the People's Republic of China. Recognition, after all, does not imply approval of a system of government. It only implies a realistic assessment of who controls what within a given political jurisdiction. In the case of mainland China, clearly the government of Peking effectively controls the apparatus of political decisionmaking for 950 million people.

For almost three decades our government has refused to come to grips with the reality of Communist authority in Peking. The abrupt decision to recognize the People's Republic represents a traumatic change in direction for American policy and has produced understandable anxiety among the people of Taiwan. As we move forward with legislation to institutionalize our relationship with Taiwan, it is there-



fore important to insure that any actions taken at this time are fully consistent not only with American national interests but with the interests of the people of his fragile island. In this regard, I would like to comment briefly on certain aspects of the situation on Taiwan which I believe have not received sufficient notice.

In my judgment, the debate on normalizing relations with the Government in Peking should occasion serious reconsideration of the support we have generated over the past 30 years to the less than democratic Nationalist Government of Taiwan. As this subcommittee knows, the population of Taiwan consists of two major elements: the native Taiwanese who constitute approximately 85 percent of the island's inhabitants, and those mainland Chinese who fled with Chiang Kai-shek to Taiwan who, along with their descendants, comprise the other approximately 15 percent. Yet today, the Nationalist Government consists almost exclusively of members of Chiang Kai-shek's party, the Kuomintang. There is little opportunity for participation by native Taiwanese in national elections. The majority of seats in the National Assembly are held by individuals who theoretically represent the 35 provinces of China, only one of which is Taiwan. They were elected from their respective provinces 30 years ago when the Nationalist Government still exercised broad control over the mainland. This anachronistic arrangement adds up to stark underrepresentation for the people of Taiwan—even though the island now represents the total extent of Nationalist control. Since elections cannot be held in the 34 mainland provinces, the Nationalist Government maintains that those who were elected 30 years ago from these provinces (some of whom today reside abroad) have lifetime rights to their seats. This aged minority of former mainlanders therefore controls the legislative branch of the Nationalist Government.

Perhaps this situation would be more palatable if the Nationalist Government were benign and passive in nature. But in fact, it is a harshly repressive regime which for years has denied the majority of people on the island the most fundamental human freedoms. Beyond that, police state tactics have been an accepted fact of life ever since martial law was declared in 1948 purportedly for a temporary period to be in effect "during the period of Communist rebellions." The martial law declaration is still in effect today and it has been reliably reported that there is frequently resort to secret arrests and secret trials as a means of dealing with political dissidents. Amnesty International reports that torture has been employed to gain "confessions" and the same organization states that "violations of human rights have been the prevailing practice in Taiwan." Indeed, for the past 30 years we have looked the other way when evidence of such repressive tactics has surfaced—preferring as a matter of expediency to place a higher value on Taiwan's status as an ally than on the fundamental rights of its citizens. Finally, the widely respected Freedom House annually publishes a Comparative Survey of Freedom which ranks nations worldwide on the degree of freedom, using a scale of 1 to 7—with the higher numbers indicating increasing degrees of repression. In its ratings published this month, Taiwan received a 5 (political rights) and a 4 (civil liberties) rating while the People's Republic of China registered 6-6 on the Freedom House scale. This is compared to a 1-1 rating for the United States. Taiwan's rat-

ing reflects a narrowly controlled political system and is hardly impressive in its contrast with the People's Republic of China. While basic political freedom and certainly economic opportunity are greater on Taiwan than the mainland, it can only be described as tragic that Taiwan hasn't adopted policies which would put it at the forefront of democratic expression.

#### PEOPLE WITHOUT A COUNTRY

It strikes me that we have in Taiwan, at this point in history, something resembling a people without a country and a Government lacking a legitimatizing basis of authority. Generally speaking, legitimacy derives from either historical claim or consent of the governed. There is a distinction between a Government in exile and a Government claiming to represent the political aspirations of the Taiwanese people. U.S. recognition of the PRC implies our assessment that the civil war in China is over. The Nationalist claim to the mainland would appear fictional and its basis of consent on the island lacking democratic test. Accordingly, in considering the legislation which will establish new unofficial ties with the Taiwanese people, I would urge the members of this subcommittee to include language which will encourage the Nationalist Chinese authorities in Taiwan to come to terms with political reality themselves and to begin good-faith efforts to establish a new basis of legitimacy resting on the consent of the government and to permit full establishment of constitutional liberties such as freedom of the press, freedom of expression, and the right to assemble. If we, as Americans, are truly sincere in our efforts to mold a new policy toward Taiwan, grounded in truth and reality, this is the least we can do on behalf of a peaceful normalization of internal relations between the majority of native Taiwanese and the minority of Chinese from the mainland.

Just as it should be made clear to the PRC that the United States will not lightly countenance the use of force against Taiwan, it should be made clear to the Nationalist Government that the United States does not easily condone the suffocation of basic individual freedoms on Taiwan. Accordingly, I would like to suggest inclusion of the following language in the legislation before the committee (H.R. 1614).

#### SUGGESTED AMENDMENT

On page 2, line 25, insert the following: "In carrying out its activities, a primary responsibility of the Institute shall be to monitor closely the functioning of democratic processes on Taiwan for the purpose of encouraging the establishment of such fundamental rights as free general elections, freedom of assembly, speech, press, and religion."

Mr. WOLFF. Excuse me, Mr. Leach, you are talking about page 2. Are we talking about the omnibus legislation, or are we talking about—

Mr. LEACH. Yes; we are talking about the basic, specific legislation.

Mr. WOLFF. That is the omnibus legislation.

Mr. LEACH. Regarding this language, I should like to stress that any effort on our part to encourage greater freedom and self-representation on Taiwan does not necessarily conflict with the administration's



recent commitments to the PRC. On several occasions, Vice Premier Deng Xiaoping has expressed his willingness to accept Taiwan's own social and economic system as well as Armed Forces. But whatever steps are taken to resolve the international status of Taiwan, it should be understood by all sides that the future of the Taiwanese people ought to be decided by those representing the majority of the people on the island, not by a Government unwilling to open its doors to full popular participation. In addition, it would be my hope that in any legislation dealing with the legitimate security needs of the Taiwanese people, a strong sense of the Congress should be established that the U.S. Government not transfer any weapons, such as riot control equipment, which are of a nature that appear primarily oriented to maintaining internal order as opposed to external security.

Unfortunately, the timing of President Carter's December 15 announcement regarding normalization of relations with the PRC had unsuspected implications for the domestic political situation on Taiwan. Within hours of the President's announcement, the Nationalist Government seized upon the normalization action as a pretext to indefinitely postpone local elections which had been scheduled for December 22 and decreed the suspension of all political activity on Taiwan. By many accounts these elections—although for a small number of seats in the General Assembly—would have resulted in significant gains for political candidates opposing the Kuomintang Party. Those familiar with the internal political situation in Taiwan were keenly aware of the significance of this political event. The President's decision to announce normalization just 8 days before the election in Taiwan demonstrated great insensitivity to—or perhaps ignorance of—the internal affairs of the people of Taiwan and may have deprived the majority of the population of any opportunity in the near future to exercise their right to speak out at the polls on their own destiny.

The consequences of President Carter's precipitous preelection announcement carries certain irony. For it is the native Taiwanese rather than their Government who have been most supportive of the U.S. normalizing relations with the PRC and who have always regarded the Nationalist claim to mainland China as fantasy. Unfortunately, it is these native Taiwanese who were most affected by the timing of the external normalization decision and who now find that the modest movement toward internal normalization of the political process on Taiwan itself has been severely jeopardized.

#### DEMOCRATIC PROCESS ON TAIWAN

Finally, as the subcommittee considers the legislation dealing with our future relationship with the people of Taiwan, I would urge that the recent tragic developments of Iran be kept in mind. The provision of sophisticated weapons to a government does not in and of itself assure the security and stability of that government. It is time we begin to profit from experience and seek to insure that the United States not be too closely associated with regimes which are not based on the support of the majority of the people. While such a policy may have short-term advantages and may, indeed, be dictated by compelling circumstances at a given moment, we must recognize that gov-

ernments which are not responsive to the aspirations of the majority of their people are living on borrowed time. In the case of Taiwan the subcommittee has the opportunity to build into the legislation language which will clearly demonstrate to the world and to the Taiwanese that the U.S. Congress is willing to go on record as encouraging authorities on the island to grant the native Taiwanese full democratic participation in the political process. Majority rule based on respect for individual rights is the linchpin of our own society as well as our human rights foreign policy. We should not shy away from advocating such a policy for the Taiwanese people.

Mr. WOLFF. Thank you very much, Mr. Leach. We appreciate the information that you have imparted to us.

I would like to ask a few questions, and I think that my colleagues would as well, and then we will get to Dr. Peng.

#### AIM OF AMENDMENT

Do I understand that you would like to have an amendment to the omnibus bill that was presented to us which indicates that a primary responsibility of the Institute shall be to monitor closely the functioning of the democratic processes on Taiwan, encourage the establishment of such fundamental rights as free general elections, freedom of assembly, speech, press, and religion?

Would you expand upon that a little bit?

Mr. LEACH. I am not sure that I understood you correctly. I would like to stress the amendment wording: "a primary" not "the primary" responsibility of the Institute shall be to monitor closely the democratic processes on Taiwan.

Mr. WOLFF. Could that mean that you would favor the idea of free general elections on Taiwan. Is that what you are getting at?

Mr. Leach. I certainly would support that, but I recognize that any institute, in and of itself, is not going to cause them. My intention in this amendment is basically to stress to the world, and to the Taiwanese, our concern for the type of government that is going to exist on the island, and also our concern for the manner in which any decisions relating to the future of Taiwan are made.

It strikes me, as a fundamental principle, that whatever international settlements are arrived at in the future, there is something inherently wrong with the minority of people deciding for the vast majority of people their own destiny.

Mr. WOLFF. Wouldn't you consider that as somewhat of a human rights amendment?

Mr. LEACH. I would consider it a very strong human rights amendment, and I would follow that by saying, unfortunately, the timing of the announcement vis-a-vis the recognition of the People's Republic of China may have caused a negative human rights response on the island of Taiwan itself, which need not have occurred.

Mr. WOLFF. As I understand it, from the recent visit that I made to Taiwan with members of this committee, there are a number of Taiwanese now in the Government.

Mr. LEACH. Yes, sir.

Mr. WOLFF. Taiwanese have places in the Government.

Mr. LEACH. Yes, sir, a few.



Mr. WOLFF. The Taiwanese have several ministers within the Government in Taipei.

Mr. LEACH. Steps are being taken, but unfortunately the election that was scheduled for December 23 was probably the most potentially significant election in the history of Taiwan in terms of the probability of introducing a larger number of native Taiwanese to the internal politics of the island.

Mr. WOLFF. Thank you.

Mr. Pritchard.

Mr. PRITCHARD. First, I want to welcome Congressman Leach to the committee. I am sorry the Congressman is not on the Foreign Affairs Committee because, in truth, he is by training and background one of the most knowledgeable people in Congress on foreign affairs. I am sorry we do not have his expertise. We are delighted to have you testify.

#### QUESTIONS OF TIMING

It seems to me that the hard part here is one of timing. There are some dangers if we take the local government to task and go after them at this particular point. It would be a great mistake to seriously damage the island in the world's eyes.

I guess I would ask you how you see the timing in this?

Mr. LEACH. The timing is always crucial with regard to any international act, and there are certain disadvantages that you have implied. By the same token, I don't think that the United States of America has ever been misguided by refusing to stand up for the principle of the majority rule.

Second, it could well be that the timing has never been appropriate. After all, we have just normalized relations with the People's Republic of China. What we are talking about is normalization of relations within Taiwan itself. I think that an effective statement to that effect is appropriate.

I might add that the language that was introduced is not extremist language. It is very moderate. In fact, it is very circumspect. Basically, what it enunciates is a principle and not a directive of any nature. As a principle, I don't think that Americans should be shy of standing for it.

Mr. PRITCHARD. Let me ask you one other thing. You have talked about freedom of assembly, speech, press, and religion. We have made a swing through a great number of countries in Asia, and I have to say that the impression we get in Taiwan is of a country that seems to be doing quite a few things right. Their standard of living is remarkably good. I noticed there were different religious there, so there is a certain amount of freedom of religion.

Freedom of assembly, I don't know. Speech and press, I guess I would have to ask you. But if we looked at people's condition, here is an island that appears to be meeting the people's needs in quite a number of areas, and quite successfully.

#### REPRESSION ON TAIWAN

Mr. LEACH. Comparatively speaking, Taiwan certainly is not as high on the evaluation scale as some countries, but I would refer the gentleman to Freedom House's ratings which judges on a 0 to 7 scale—with

the higher numbers indicating increasing degrees of repression—Taiwan at 5-4 with the People's Republic of China at 6-6. There are countries below 5-4, but 5-4 is not a very healthy place to be.

I might also point out that there have been instances of restraints on individual freedom, not only in terms of the press, which is carefully controlled, but with regard to incarceration and harassment of certain religious leaders, which has been very, very serious.

Beyond that, one of the things that distinguishes Taiwan from all governments of the world, and in this sense it stands alone, is that its claimed legitimacy is based on the fact that the Government controls another parcel of land, one which it is not even occupying. That basis of legitimacy is a claim that can easily lead to a rationale for severe oppression.

From Taiwan's point of view, I would also like to say that another failure that distinguishes it from most other governments of the world is that, given its economic position, which is very impressive, and its stable population growth, which has not exploded beyond the economy's capacity to deal with it, there are few countries which can more afford to broaden political participation. In the sense of ability to afford to democratize, Taiwan certainly is at the forefront of countries that should be able to move in that direction.

Mr. PRITCHARD. You would say that it is in their own interest to do that.

Mr. LEACH. I strongly feel that, yes.

Mr. WOLFF. The time of the gentleman has expired.

Mr. Hall.

Mr. HALL. Thank you, Mr. Chairman.

#### NEED FOR AMENDMENT NOW

Congressman Leach, since we are not going to have, apparently, government-to-government relationships with Taiwan, and with respect to your particular amendment as it is related to the Taiwanese majority, I really don't understand the reason for the amendment.

I think that the emphasis on freedom would have been prior to normalization of relations with the People's Republic of China.

Mr. LEACH. I would suggest that we did not really have specific legislation dealing with our diplomatic recognition of the Republic of China prior to the normalization. Beyond that, it strikes me that this is a subject very appropriate to consider when we are establishing relations people-to-people. For that is the principle with which we are going forth under this legislation, and this is an amendment that talks of our dealings with people.

What this amendment does is call upon the Institute to monitor closely the functioning of democratic processes on Taiwan. It does not say anything for or against the Government in that sense. It is a people-to-people approach, and I think that it is appropriate at this time.

Mr. HALL. That is all I have.

Mr. WOLFF. Thank you very much.

Now, we will proceed with Dr. Peng. If you would like to stand by, we would be delighted to have you.

Mr. LEACH. Let me say that I think Dr. Peng should be responding to some of these questions, rather than me.



Mr. WOLFE. Before you proceed, Dr. Peng, since the Members of Congress have taken their oath in the first days of the Congress, we should like to swear all of our witnesses, if you don't mind being sworn.

Mr. PALMER. Dr. Peng, do you hereby swear or affirm that the statement I am about to make is the truth, the whole truth, and nothing but the truth. Do you so affirm?

Mr. PENG. I do.

**STATEMENT OF MING-MIN PENG, DIRECTOR, TAIWANESE  
AMERICAN SOCIETY; DIRECTOR, FORMOSAN STUDIES**

Mr. PENG. Mr. Chairman, I want to thank you and the committee for giving me the opportunity to speak here. I will be very brief, so that you will have more time to ask questions.

Mr. Chairman, the people of Taiwan wish to develop the closest relationship with the United States. But Taiwan's security cannot be assured solely by supplying it with military equipment and weapons. The people on Taiwan believe political stability is essential for the long-term security of the island, and the political stability greatly depends, in turn, on the degree and pace of normalization of political life within Taiwan.

For more than 30 years, the political and legal anomalies have consisted, among others, of:

1. The Constitution based on the fiction that the Nationalist Chinese regime is the government of all of China, and Nationalist policy based on the myth of an eventual reconquest of China by the same government.

2. Martial law, in effect, already for three decades and expected to be enforced indefinitely, and the resulting suspension of constitutional guarantees for the same period of time.

3. The native Taiwanese, accounting for 85 percent of the population, yet having about 5 percent representation in national legislative bodies, the remaining seats being held for life since 1948 by those who have been exiled to Taiwan as a result of the Communist takeover of China.

4. The continuous suppression of the opposition to the present regime.

Obviously, the above situation needs to be changed if stability and security are to be sought for Taiwan.

I believe that in any discussion of future United States-Taiwan relations, the democratic aspirations of the Taiwanese majority must be seriously taken into account, and every encouragement must be given to the efforts to initiate and accelerate democratic processes in Taiwan, such as genuinely free general elections, freedom of expression and association, et cetera. Thus, ultimately, the people on Taiwan should be given the opportunity to decide their own future free from outside coercion.

Thank you.

Mr. WOLFF. Thank you, Dr. Peng. You are director of the Taiwanese American Society. Can you tell us what it is?

Mr. PENG. It is a small nonprofit research foundation supported by Taiwanese inside and outside for our restoration, history, economy, and public affairs.

Mr. WOLFF. Does your organization have ties with any other organizations?

Mr. PENG. No, this is a purely research institution.

#### VIEWS OF TAIWANESE PEOPLE

Mr. WOLFF. Would you say that you are speaking for the general population, or speaking for a segment of the population in the statement you made, or are about to make?

Mr. PENG. I believe that the views I expressed are shared by all Taiwanese, or the majority of Taiwanese.

Mr. WOLFF. On that question, the overall question of elections, would that also include self-determination for the people?

Mr. PENG. Certainly in the long run, and ultimately, I think, if you talk about the human rights, human rights include the right for the people to choose their own form of government, and have a system that has the meaning of self-determination.

#### NORMALIZATION AND SELF-DETERMINATION

Mr. WOLFF. On the question of self-determination, how do the Taiwanese people, as distinguished from those who have come from the mainland, how do the Taiwanese people feel, do you think, about the question of the normalization with the People's Republic of China?

Mr. PENG. We have just talked with two gentlemen who have just arrived from Taiwan, who are very distinguished religious leaders, ministers in the church in Taiwan, and we put this question to them. They answered us that the majority of Taiwanese are in favor of the normalization. Among the reasons is that this is a reality that has to be accepted. Second, they see the hope of change in the domestic situation as a result of this new development.

Mr. WOLFF. Since there will be no free elections in the People's Republic of China, do you think that after normalization you would get free elections on Taiwan if the total procedure was followed through?

Mr. PENG. I could not follow your question.

Mr. WOLFF. If in the normalization there was unification, which is hoped for, between the People's Republic of China, the people on Taiwan—

Mr. PENG. I think the people on Taiwan believe that if Taiwan becomes a part of China, there will be no free elections. So when they say that they are in favor of normalization, it does not mean that they want to be a part of the People's Republic of China.

Mr. WOLFF. Then you would say that you favor normalization of relations between the United States and the People's Republic of China, but not the unification. Is that correct?

#### TAIWANESE REJECT REUNIFICATION

Mr. PENG. That is correct. The Taiwanese are very much against the idea of Taiwan being annexed by China. On the other hand, as I said, as the argument is made in the United States, China must be recognized by the United States, and then the main feeling of the native Taiwanese



is that this is a chance to advance the democratic processes in Taiwan because the Government in Taiwan lost its international standing. It has become internationally a kind of nonperson.

Mr. WOLFF. How do you expect to get any more in the way of a separate entity from the People's Republic of China than you have at the present time under the Nationalist regime that is in power?

Mr. PENG. Taiwan, in fact, has been a separate entity.

Mr. WOLFF. Historically. On what does the People's Republic of China base their claim to Taiwan? Historically, it was not an independent nation, am I correct? It was part of greater China?

Mr. PENG. Once upon a time, until 1895 Taiwan belonged very loosely to China. How much control China had exercised at that time is a matter of argument. But even if we concede that up to 1895 Taiwan was a part of China, this does not give China the right to claim Taiwan.

The fact that some territory formerly belonged to a certain country does not give that country the right to claim this territory. We accept the principle that Taiwan should be independent.

Mr. WOLFF. Thank you very much.

Mr. Pritchard.

Mr. PRITCHARD. Thank you, Mr. Chairman.

Dr. Peng, we are very happy that you have come to testify. I think what disturbs some of us is, we see the people on Taiwan as seeing this as an opportunity, and we see the chances of Taiwan gaining more freedom as a rather small chance.

We see the possibility, and I am not saying this year, but let's say 25 or 30 years from now, of the People's Republic of China developing some arrangement. At that point, you will go backward instead of forward. So your chance of getting more freedom will be severely limited. I think this is our concern. We are very fearful you will lose that amount of freedom and advantages that you now have.

How do you craft this so that you end up with the best of both worlds, which is what you are hoping? You are hoping that America will help Taiwan stay independent, and then by exerting influence on the Government there, it will evolve into a more democratic place. Is that correct?

Mr. PENG. I believe that the problem facing Taiwan is not the alternative of whether you choose the Government on Taiwan, or the Government in Peking, because this is not the reality. Of course, there is going to be a longtime threat from Peking toward Taiwan. But I think the people in Taiwan are concerned right now about the nature and character, and the behavior of the present regime in Taiwan.

They believe that they now can have a more representative government on Taiwan, and in the future they believe that there is some way of peaceful coexistence with Peking. This is the way that people think.

They don't feel now that they are facing the alternative of choosing Taipei or Peking. Certainly the standard of living is incomparably higher on Taiwan. But what I am trying to demonstrate to you is the thinking of the people. They think that right now and in the foreseeable future, as the American Government has said repeatedly and assured the world, that there is no immediate threat. Peking has no ability, no intention to take over Taiwan in the foreseeable future.

Under those circumstances it is, I think, the main concern of Taiwanese to concern themselves with the conditions in Taiwan.

Mr. PRITCHARD. Dr. Peng, did you say "no ability and no desire to take over?"

Mr. PENG. That is what your State Department officials are telling us.

Mr. PRITCHARD. I think that the State Department is leading you astray by telling you that the People's Republic of China has no desire to take over Taiwan. I think that they have a great desire to bring it back, whether or not they have the capacity is another question.

#### PEOPLE'S REPUBLIC OF CHINA DOES NOT PLAN TO ATTACK

Mr. PENG. They have no intention to do so. Personally, I accept this statement of the situation because, I think, to us in the past few years, in spite of Peking's rhetoric, it is at the bottom of the priority list, or maybe out of their list of priorities. I think we should not confuse their propaganda or revolutionary rhetoric with the reality.

From what they have been saying, from what Premier Deng has been saying as to the policy that China would take toward Taiwan, there is no consistency. One day they will say that they can wait 50 years, 100 years; next week, they will say, 10 years, or 10 years is too long, and it will be 1 year. This shows that, in fact, Peking does not believe that they can take over. There is no policy that they can see that they can take over Taiwan in the foreseeable future. This is my interpretation.

Mr. PRITCHARD. As long as we stand firm.

Mr. PENG. Exactly.

Mr. WOLFF. The time of the gentleman has expired.

Mr. Hall.

Mr. HALL. Thank you, Mr. Chairman.

I notice that you were at Wright State University. Were you a professor there?

Mr. PENG. Yes; I was a professor of political science at Wright State from 1972 to 1974.

#### LIMITED ELECTIONS

Mr. HALL. In reading your statement with respect to the national legislative body, you say that the Taiwanese occupy 85 percent of the total population but they have only about 5 percent of the seats.

Mr. PENG. That is right.

Mr. HALL. You say that many seats are held for life since 1948 by those who came over from mainland China.

Mr. PENG. Yes.

Mr. HALL. How did that happen?

Mr. PENG. Because the national legislative body had been formed in China before the Nationalist Chinese were forced to evacuate the mainland, so the National Legislature moved to Taiwan. As a result, those members are members for life. The reason is that there is no way of holding elections in China. So those people who came from China became permanent members of the Legislature, and only those members elected from Taiwan, as one of the 35 provinces of China, has



the physical possibility of reelection. So this is the way that it remained for 30 years, or more than 30 years.

I hope that I made this clear. Most of those members that came over from the mainland are over 70 years old.

Mr. HALL. If, in fact, the Taiwanese majority did not receive freedom, as you have outlined in your comments, what do you see in the future for the Taiwanese majority. Do you see rebellion, do you see turmoil?

Mr. PENG. I think Congressman Leach has mentioned that the situation is not unsimilar with Iran. Even if you give the best military technology to the Government, if this Government cannot command popular support, political security will not be assured, especially after the people of Taiwan become aware that the Government is kind of an outcast.

So people have begun to become more and more restless. So there is a danger to the political security. For the security of Taiwan, we have to have more normal administration in Taiwan.

Mr. HALL. My point is that for three decades under martial law you have had a majority of the Taiwanese holding 5 percent of the Government seats, so for quite a long time you have not really had any influence on changing the affairs of the Government. All of a sudden, you say that it is going to be—

Mr. PENG. I would not say that. The study of Amnesty International shows that there are a large number of political prisoners on Taiwan. So I am not saying that because of the United States-China relations normalization, there is a sudden emergence of Taiwanese revolt, or anything like that.

However, certainly people have begun to feel more strongly that the political basis, or the moral basis of the Government has been totally destroyed. Before the Government still claimed that it was recognized by the U.S. Government, and they had a legal Government. Now they cannot say that.

The political base of the Government has been fatally damaged by this new normalization of the relations with China. Certainly the Taiwanese feel more certain, and they are getting more agitated. This is a danger we see in the future.

Mr. HALL. Thank you.

Mr. WOLFF. Thank you very much, gentlemen. Thank you, Mr. Leach. We appreciate your coming before us and giving us the benefit of your experience and advice.

[The following was submitted for the record:]

LETTER AND STATEMENT OF ROBERT P. PARKER, PRESIDENT, AMERICAN CHAMBER OF COMMERCE IN THE REPUBLIC OF CHINA

KIRKWOOD, KAPLAN, RUSSIN & VECCHI.

Washington, D.C., February 9, 1979.

Re Statement of American Chamber of Commerce in the Republic of China.

HON. LESTER WOLFF,

Chairman, Subcommittee on Asian and Pacific Affairs, Committee on International Relations, U.S. House of Representatives, Washington, D.C.

DEAR CHAIRMAN WOLFF: Thank you very much for inviting me to testify at the February 15, 1979, hearings of your Subcommittee in connection with the proposed U.S.-Taiwan "omnibus" bill.

Although I find with regret that I will be unable to appear in person, I have prepared a written statement expressing the views of the American Chamber,

and respectfully request that it be included in the record of your hearings. For the benefit of the Subcommittee, I am enclosing 50 copies of my statement.

I would particularly like to invite your attention to some of the important, pragmatic business problems listed on pages 17-21 of my statement, which the proposed bill fails to resolve, and to the solutions which we propose, as stated on pages 21-24.

Please accept the appreciation of our Chamber, and the more than 500 members which it represents, for your efforts to provide a free and secure future for Taiwan, and a sound legal structure for the ongoing trade and investment relationships between our country and Taiwan, within the context of our new policy towards China.

Sincerely yours,

ROBERT P. PARKER,

*President, American Chamber of Commerce in the Republic of China.*

Enclosure.

Mr. Chairman, Members of the Committee, my name is Robert P. Parker. I am managing partner of the Taipei office of Kirkwood, Kaplan, Russin, & Vecchi, an American law firm with 8 offices in the United States and 5 foreign countries. This year I have also been elected as President of the American Chamber of Commerce in the Republic of China.

The American Chamber of Commerce in the Republic of China has since 1976 made clear that we do not oppose improved U.S. relations with mainland China provided they are not at the expense of the Republic of China on Taiwan. The Carter Administration has unfortunately chosen to "normalize" relations with mainland China on terms which are sharply prejudicial to Taiwan. The Administration's decision to plunge into this major change in relationships without adequate notice and without having first worked out a viable formula for continued relations between the U.S. and Taiwan seriously threatens a broad range of American business interests in Taiwan.

The American Chamber of Commerce in the Republic of China represents a membership of more than 500, including all of the major American-invested companies in Taiwan. Our Chamber thus speaks for those Americans who live and work in Taiwan, who are directly involved in carrying out the commercial relationships between our country and Taiwan, and who can speak to the present situation with the benefit of many years of first-hand knowledge.

Our close involvement with Taiwan has given most of us a deep affection for that country and its people and a well-earned respect for its government. As strongly as we may feel about the impact of "normalization" on them, however, it is not our purpose before you today to argue on their behalf. Nor are we here to challenge the morality or political wisdom of the Administration's new policy towards Taiwan, though it is certainly subject to challenge on both grounds. We are an organization dedicated to the protection and advancement of American economic interest in Taiwan, and our purpose before this Committee is to point out how those interests have been jeopardized by "normalization" and to offer specification proposals for correcting (1) the failure to provide adequately for the security of Taiwan against the threat of coercion from mainland China, be it military or economic, and (2) the failure to offer a clear and sufficient legal framework for the continuation of U.S.-Taiwan relationships adequate for the normal functioning of trade and investment.

#### MILITARY SECURITY

Business thrives on certainty, and no element of certainty is more essential than a reasonable assurance of physical security. No one can seriously question the existence of a threat to the security of Taiwan. A takeover of Taiwan has been and remains the emphatically stated goal of the Peking regime, enshrined in its constitution. Withdrawal of U.S. diplomatic relations and termination of the mutual defense treaty increases the risk that this threat will become reality. It matters little whether the Peking government refers to "liberation" or "reunification"; both are euphemisms for a communist takeover of Taiwan against the will of its people.

For several years mainland China's refusal to forswear the use of force against Taiwan was seen as the major stumbling block in the path of "normalization." Indeed, most observers assumed obtaining this pledge was the sine qua non of the American position. When the relatively pragmatic group of communists headed by Teng Hsiao-Ping seized power in the Peking government,



thoughtful analysts concluded that their need for a closer and more cooperative relationship with the United States would result in a "normalization" on terms quite favorable to the U.S. and Taiwan. It therefore came as a shock when the Carter Administration accepted all three of mainland China's demands for "normalization" and gave in completely or in significant part on all of its own "conditions," including the pledge<sup>1</sup> against use of force. Many of the American investments in Taiwan have, of course, been made since 1972 and have thus taken the likelihood of "normalization" into account, but these terms were weaker than even our "worst case" expectations.

The Administration has chosen to rely for Taiwan's security on little more than statements by Teng Hsiao-Ping that while Red China reserves the right to use force against Taiwan, it has no present intention of doing so. The obvious danger in such a reliance is that Mr. Teng, even if he is speaking truthfully, may die, be purged again, or simply change his mind. His statements are not binding on the Peking government and are subject to change without notice by the present leadership or their successors.

The Administration's assumption of a benign Peking attitude towards Taiwan further rests on the premise that mainland China would not risk displeasing the United States in view of its urgent need for technological and other assistance in its "four modernizations" program. One need only note that Vietnam, which similarly needs American know-how, was hardly deterred by this consideration when it decided to take Cambodia.

A final argument used by the Administration to defend its failure to give or obtain firm assurances of Taiwan's security is that mainland China lacks the capability of mounting a serious military threat to a Taiwan which has been "armed to the teeth." Both parts of this argument are untrue. There is an obvious inconsistency in maintaining, as the Administration does, that mainland China is a counterweight to the Soviet Union but not a threat to Taiwan. Defenders of the "normalization" policy point out that mainland China lacks the amphibious assault capability for a direct attack on Taiwan, but ignore the other alternatives for using force against Taiwan, including the possibility of an air/sea blockade.

If Peking, which has one of the world's largest navies, announces an air and sea blockade of Taiwan, it is fair to say that few ships or aircraft would attempt to run that blockade and risk being sunk or shot down. Quite disturbingly, President Carter in his January 19, 1979 press conference used Peking's favorite "buzz words" to characterize Taiwan's situation as "an internal Chinese matter". The United States, at Congressional initiative, must place the Peking government on notice, so there can be no miscalculation, that any such action will be firmly opposed by this country.

The idea of a Taiwan "armed to the teeth" also does not withstand inspection. Because of the vast inferiority to its enemy's size, Taiwan like Israel must maintain a clear technological superiority in arms. For the past several years, however, Taiwan has, unlike Israel, been unable to purchase the advanced fighter aircraft, modern anti-submarine missiles and other sophisticated weapons needed for its defense. The Red Chinese "concession" on U.S. sale of defensive arms to Taiwan is not only subject to a one year moratorium and not only contradicted by the Peking government but has been demonstrated in practice to have a "Catch-22" under which the U.S., while technically reserving the right, refuses in practice to provide the modern defensive arms Taiwan needs. This policy goes so far as to deny Taiwan the right to pay cash for a 20-year-old airplane, the F-4.

The American Chamber on Taiwan therefore calls upon the Congress to enact legislation which would include the following: (1) a resolution stating a strong American commitment to Taiwan's security, (2) an assurance of Taiwan's ability to obtain from the U.S. the defensive arms it needs, and (3) provision that those things—including access to American technology, most favored nation ("MFN") treatment, Eximbank credits, and others—that mainland China wants from the United States, will be withdrawn if military force is used against Taiwan.

<sup>1</sup> There is, in fact, some confusion within the Administration as to whether the American side even asked for such a pledge. In his Jan. 19, 1979 press conference, President Carter stated that the U.S. sought such a pledge but was unable to obtain it. In a press conference on Dec. 19, 1978, however, Assistant Secretary of State Richard Holbrooke stated that no such pledge was sought, presumably because the administration "knew" that they could not get it. The latter view was also expressed by Ambassador Woodcock in a meeting which I attended in Bangkok on Jan. 5, 1979.

## ECONOMIC COERCION

A more likely threat to Taiwan than military attack, and therefore more dangerous, is the threat of economic coercion. Even the "peaceful" means by which Teng Hsiao-Ping avers that communist China wants to take Taiwan could include secondary boycotts and other forms of economic coercion designed to strangle Taiwan into submission. As an island devoid of most natural resources other than the intelligence and industriousness of its people, international trade is the lifeline of Taiwan's prosperity. If the Congress is at all serious about protecting the freedom and prosperity of Taiwan, meaningful action to help insure Taiwan against the threat of economic warfare by mainland China is essential.

The Peking government's intent to impose a secondary boycott on foreign companies dealing with Taiwan was enunciated by Chou En-Lai during trade negotiations with the Japanese in 1970 and 1971. In the boycott blueprint sketched by Chou, the pre-eminent "pragmatist" whose chief disciple is Teng Hsiao-Ping, the key elements were a refusal by the Peking government to deal with (a) firms aiding Taiwan, (b) firms selling to Taiwan on a long term deferred payment basis, and (c) firms investing large amounts of capital in Taiwan. This policy clearly affected economic relations between Japan and Taiwan, particularly the Japanese banks.

Mainland China has not yet imposed as obvious a boycott on firms dealing with Taiwan as the Arabs' boycott of Israel. There is ample evidence, nevertheless, that a boycott of such firms is already being pursued by the Peking government in a more subtle and selective manner, representing great potential for harm to Taiwan.

The refusal of communist China to honor American Express travellers' cheques because of that company's operations in Taiwan is well known. The mainland-related business gathered by First National Bank of Chicago after it announced, with fanfare, a decision to stop doing business with Taiwan also received wide publicity, as did Pan American World Airways' signing a major hotel deal with Peking within a few weeks after discontinuing its scheduled service to Taipei. In the January 5, 1979 Bangkok meeting between American chiefs of mission and American Chamber presidents in Asia, Ambassador Leonard Woodcock confirmed, perhaps inadvertently, the existence of such a boycott when he said that Pan Am is now the favored U.S. carrier in China and that no U.S. airline would be granted landing rights on the mainland as long as it serves Taiwan.

Two of the foregoing examples involve banking or financial relations and, indeed, banking provides an excellent illustration of Taiwan's financial dependence upon U.S. institutions, governmental and private, and conversely, of the stake this segment of the American economy has in Taiwan. There are now eight American banks operating full service branches in Taipei, and another eight maintain a direct presence through representative offices. Contrast this with the fact that there is no European bank with either a branch or representative office on the island and only one relatively inactive branch of a Japanese bank.

Over 100 American banks—a broad cross-section of the U.S. banking industry—currently extend more than US\$2 billion in credit accommodation to borrowers on Taiwan. These borrowers are leading private Chinese companies, a host of foreign invested multi-national firms doing business on Taiwan, and nearly every one of the Chinese government agencies, banks and productive enterprises. That US\$2 billion also excludes Eximbank loans (another \$1.8 billion) and commitments of the very substantial Taiwan "country exposure" of private American banks. For Taiwan to proceed as a viable nation will require even greater financial resources in the years ahead. During the next 4 to 5 years alone, approximately US\$5 billion of capital will be needed to finance Taiwan's continuing transition from a producer of labor-intensive light industrial products to a developed economy relying increasingly upon heavy and technology intensive industry. At least half of that amount will likely be raised internally, but the other US\$2.5 billion will have to be provided from offshore sources, much of it private loans and the largest portion (an estimated US\$1.5 billion) in term loans from U.S. banks.

On the basis of its outstanding economic performance to date, American banks rate Taiwan as one of the best credit risks in the developing world. But banks are ultra sensitive to political and economic adjustments, and the imposition by Peking of economic sanctions against Taiwan could easily trigger an immediate credit freeze, or even an attempt to disengage, by U.S. banks. The impact on Taiwan of such a move would be swift and severely adverse, because its ability



to access the international financial markets, for which it is dependent on the American banks, is an intrinsic ingredient of its economic well being.

Exports generate nearly 60 percent of the ROC's Gross National Product; and banks rely heavily upon the cash flow from those exports to service the country's debt. If economic coercion by Peking were to inhibit Taiwan's ability to repay such foreign debt, the consequences for U.S. banks could be calamitous. The gravity of the consequences of economic sanctions thus makes it absolutely incumbent upon the Congress promptly to enact legislation not simply to discourage, but effectively to prevent, any such action by Peking, by making the cost to them unacceptable.

Antiboycott legislation is, of course, already on the books. It expires on September 30th of this year, but is widely assumed to be renewed. That legislation was drafted with the Arab boycott of Israel in mind, but is not so limited by its terms and could be used to afford Taiwan a measure of protection against economic coercion from mainland China, provided that questions regarding Taiwan's legal status are satisfactorily resolved in the omnibus legislation.

There is, however, reason to question whether, in the absence of congressional mandate, the Administration is willing to apply this legislation, in those areas where administrative discretion comes into play, so as to afford such protection to Taiwan. If anything, it has signaled an intent to reward those firms which have cut commercial ties with Taiwan in order to curry favor with the mainland—as demonstrated when Pan Am's Mr. Seawell and First Chicago's Mr. Abboud were the only airline executive and the only American banker, respectively, invited to dinner when Mr. Teng dined at the White House.

In this atmosphere it is hardly surprising that the home offices of many multinational corporations have taken a low profile on the Taiwan issue. Sensing the drift of Administration thinking, many have taken refuge in what amounts to a self-imposed boycott. If the Administration continues to give the impression that it sanctions a boycott of Taiwan, we will confront the ultimate irony of having the Executive Branch do Red China's dirty work for them.

The problem with the antiboycott legislation, moreover, is that its penalties are all aimed at American companies. We recognize that it can be useful to have a statutory excuse for refusing to comply with a foreign boycott, but as an American Chamber of Commerce, we would prefer another approach.

Part of the answer, in that extreme area where economic and military coercion may overlap, would be to provide for the continued availability of OPIC political risk insurance for new American investments in Taiwan. The United States government has by its action placed American investments in Taiwan in a position of greater exposure to such risks, and it has a corresponding obligation to see that the protection afforded by OPIC insurance is not withdrawn.

We believe that the best solution, however, as a supplement and not as a replacement for those previously mentioned, would be to treat military and economic coercion alike, by making Peking's access to U.S. technology, government financing and the American marketplace subject to revocation in the event that they employ either form of warfare against the ROC.

#### LEGAL FRAMEWORK

The American Chamber's concerns over failure of the omnibus legislation to provide a clear and sufficient legal framework for U.S. investments and trade with Taiwan are paramount. Unlike our concerns with military and economic security, which are or are assumed to be long-term, the problems caused by lack of a carefully thought through solution to the change in legal relationships between the U.S. and Taiwan is an immediate and pressing problem.

The American Chamber has for the past 2½ years been submitting a series of specific, pragmatic questions to the State Department and the White House as to how they intend to resolve certain business-related issues that derecognition of the ROC would inevitably create. Despite our numerous requests, orally and in writing, we never received a substantive responsive answer to any of our questions. Even after the "normalization" announcement, we were told by the State Department to await the omnibus legislation and find our answers there. Now, however, we have the omnibus bill in hand and discover, to our dismay, that to the limited extent it contemplates the impact of derecognition on private legal relationships at all, the resulting provisions are vague in expression, naive in approach, and wholly inadequate to the needs of American companies doing business in or with Taiwan.

The basic problem is reflected in the obvious inaccuracy of President Carter's statement that his normalization policy was "recognizing simple reality". The government in Peking is not now and never has been the government in control of Taiwan. Recognizing that government's claim to be the legal government of Taiwan and ignoring the fact that the government of the Republic of China governs Taiwan, is the furthest thing possible from recognizing reality; it creates a double fiction, and greatly confuses the legal context within which corporate and individual citizens of both countries must operate.

The government of the Republic of China meets every test of a government under international law, and is a government of which the United States should be proud. No other government of a developing country has done a better job during the last quarter century of improving the welfare of its people than the Republic of China on Taiwan. Starting in the 1950's the Republic of China carried out the most successful program of comprehensive land reform in modern times. Fourteen years ago it thanked the U.S. for past foreign aid assistance and terminated its participation in the aid program. This past year Taiwan's remarkable economic boom, which has so clearly demonstrated the superiority of its free enterprise system over the mainland's communism, boosted Taiwan to the position of eighth largest trading partner of the United States (with a total trade more than 7 times larger than Red China's). At the same time the ROC has accorded far greater individual liberties to its citizens than are found in most countries of the world. Taiwan's real growth in 1978 was 12.8 percent, exports were up 35 percent, imports increased 30 percent, per capita GNP rose to over \$1,300, inflation was held to 5.8 percent, and the budget was balanced. Unemployment in Taiwan is virtually non-existent, and its people enjoy one of the most equal distributions of wealth of any country in the world. The top 20 percent of income earners in Taiwan have an average income only 4.1 times larger than the bottom 20 percent. In many developing countries the ratio is nearer 25 to 1, and even the United States does not share its prosperity as evenly among its citizens as the ROC.

Bear in mind, too, that Taiwan's size is not insignificant. Its population is larger than that of Greece, Czechoslovakia, Sweden or Venezuela. It has as many people as Australia and New Zealand combined. It is five times larger than Israel. Taiwan is thought of as small primarily because its size is constantly contrasted with that of mainland China; but all the free countries of the world (other than India) are smaller than the two communist giants, mainland China and the Soviet Union, so basing our loyalties on relative size would be as foolish as it is cynical.

The Administration's insistence on treating the Taiwan government as non-existent, and referring only to "the people on Taiwan" makes the U.S. government look ridiculous—and, of course, too weak to stand by its ally when Peking dictates otherwise. This absurdity also creates legal problems that the proposed omnibus legislation does not come to grips with in its present form.

Virtually all of the American-invested companies in Taiwan depend to some degree upon provisions contained in treaties and executive agreements between the U.S. and ROC governments. Although President Carter has stated that these agreements, other than the Mutual Defense Treaty, in effect on December 31, 1978, will remain in effect, the proposed omnibus bill does not so provide. Moreover, it is not at all clear that such agreements, if transformed into private contracts between two non-governmental instrumentalities, would continue to have the force of law in either country. The American Chamber calls upon the Congress to adopt explicit provisions rectifying both of these important omissions.

Equally important to American business interests in Taiwan, especially given the manner in which the Mutual Defense Treaty has been unilaterally terminated by President Carter without prior consultation (either with the ROC or the Congress), is obtaining adequate assurance that the government-to-government commercial agreements upon which we rely will not be similarly dealt with. The extremely important Friendship, Commerce and Navigation ("FCN") Treaty, for example, also has a clause permitting either party to terminate it upon one year's notice. The American Chamber therefore urges the Congress to provide by law that the Executive Branch may not terminate any additional international agreements with Taiwan unless prior concurrence of the Congress or the ROC government is first obtained.

The practical problems not clearly resolved by the draft omnibus legislation may be exemplified by the following items, which are by no means comprehensive and are intended for illustrative purposes only:

(1) Several major American-owned companies in Taiwan export products or components to the U.S. under MFN or generalized system of preferences ("GSP"), both of which by law are restricted from application to most communist coun-



tries. Since the U.S. has recognized the Peking government as the sole legal government of China, including Taiwan, these companies are uncertain whether Taiwan might be deemed part of the "People's Republic of China" for this purpose.

(2) Such exporting companies also cannot be sure, under the proposed legislation, whether exports from mainland China might be combined with those of Taiwan in determining whether GSP limits or quotas under outstanding orderly marketing agreements have been exceeded.

(3) Insurance contracts written by American insurance companies generally exclude coverage in communist countries. If such contracts are litigated in U.S. courts, would this exclusion be deemed to apply in Taiwan?

(4) Relations between U.S. and Taiwan companies, like all commercial relationships, are subject to potential claims and disputes. Unless a satisfactory mechanism for the resolution of such disputes is available, commercial relationships will be seriously impeded. Under the proposed bill the enforceability in U.S. courts of judgments entered by courts of the R.O.C. is highly doubtful, but reciprocity is a basic requirement under R.O.C. law for the recognition and enforcement of U.S. judgments in Taiwan.

(5) Billions of dollars in currently outstanding credits by U.S. banks have been borrowed or guaranteed by the R.O.C. government, usually under contracts governed by U.S. law. How can American banks or the sellers of major U.S. made capital goods safely transact such business in the future without knowing the capacity under U.S. law of the government of the R.O.C. to enter into and perform such contracts?

(6) Similarly, many contracts between U.S. corporations and the R.O.C. government require the R.O.C. to designate an agent for service of process in the U.S. Under the proposed bill it seems doubtful whether the R.O.C. government has the capacity to sue and be sued in the U.S. courts. Unless the American parties to such contracts can be assured of their ability to sue the R.O.C. here, in an event of default, for adjudication by the courts most familiar with the U.S. law which governs almost all such contracts, the willingness of American companies to enter into such previously attractive transactions will certainly diminish.

(7) American companies which have or are contemplating contracts with the R.O.C. government are confused by the State Department's insistence on using the meaningless term "the people on Taiwan" and on denying the fact that the R.O.C. government is a government. They do not comprehend how a guarantee or other contractual provision could be enforced against "the people on Taiwan" and fear that the State Department may inadvertently be creating defenses to the effect that the creditor should look to the PRC, as the "successor government" under U.S. law, for satisfaction of such claims. Moreover, contracting in the name of a non-governmental entity established by the R.O.C. (under State Department duress) would not be an acceptable substitute, since that entity would have few, if any, assets. Certainly it would not own the foreign exchange reserves of the R.O.C. treasury, which to the American party provide the real security in any such undertaking. Clearly, then, the R.O.C. government should for commercial purposes have not only the ability to contract, sue, and be sued, but to do so in its own name.

(8) The profitable relationship U.S. banks have had with Taiwan, both in loans and deposits, will be jeopardized if the R.O.C. cannot be assured that its funds and other property in the United States are immune from attachment by third parties, whether they be private claimants or the Peking government. The R.O.C. like other governments, customarily waives its sovereign immunity for the purpose of certain specific transactions, such as large borrowings, but it must first have the assurance of such immunity before it will be willing to keep its deposits with U.S. banks, and in order for the banks to have the credit security such deposits represent. Absence of sovereign immunity would severely restrict commercial and financial relations between the U.S. and Taiwan, but the proposed legislation does not clearly provide for it and statements made by officials of the State Department on the point have not been reassuring.

(9) If orderly marketing agreements and other trade agreements are concluded between two non-governmental entities representing the U.S. and Taiwan, would such agreements be subject to attack under the U.S. antitrust laws?

(10) If the Peking government should exercise its claim to regulatory jurisdiction over Taiwan, U.S. companies operating in the R.O.C. could be faced with PRC assertions of illegality for simply paying R.O.C. taxes or engaging in other activities in Taiwan which are not only legal but mandatory under R.O.C.

law. For purposes of SEC reporting requirements, the Foreign Corrupt Practices Act, and all other purposes under U.S. law, it should be made clear that, despite "normalization," the PRC has no jurisdiction over Taiwan.

(11) The Institute's corporate powers authorize it to engage only in "charitable, educational and scientific activities", raising a serious question whether it has the legal authority to deal with the broad panoply of governmental acts, from selling nuclear fuel and defensive weapons to issuing visas and negotiating trade agreements, delegated to it. In addition to our doubts about the use of this private vehicle to carry out a U.S. Governmental role, we question the wisdom (as well as the arrogance) of the State Department's attempting to force the ROC to create a similar artificial "instrumentality" to deal with the Institute. The instrumentality of the people on Taiwan is the ROC government; both our friendly relations and the need for legal clarity are better served if we allow the ROC to deal directly with the American instrumentality.

(12) U.S. companies and individual citizens doing business in Taiwan pay their taxes to the ROC government, not to "the people on Taiwan", but have no assurance under the proposed bill that the foreign tax credit provisions of the Internal Revenue Code can continue to be availed of by them with respect to such taxes.

In response to the problems either created or left unresolved by derecognition and the proposed omnibus legislation, the American Chamber offers these specific suggestions, which are submitted not in statutory language but as principles around which such language can be drawn: (1) All references in the omnibus legislation should be to the government on Taiwan rather than the people on Taiwan, or, alternatively, the latter expression should be defined to mean the government of the Republic of China; (2) express provision should be made for the continuation in effect of all treaties and executive agreements, other than the Mutual Defense Treaty, outstanding on December 31, 1978; for the legal effect of such agreements to remain as before; for subsequent agreements between the U.S. and Taiwan to have similar legal effect; and for the Executive Branch to obtain prior agreement of the Congress or the ROC before terminating any such agreement in the future; (3) one or more new sections should be added to the omnibus bill stating that for all purposes under U.S. law (a) Taiwan shall not be deemed part of any communist country, (b) no communist country shall have jurisdiction beyond the territory under its actual control to prescribe, or standing to enforce in the courts of the United States, any rule or law with respect to Taiwan, its residents or their property; (c) Taiwan shall have all the attributes of sovereignty with respect to the territory within its control, its residents and property; (d) the government on Taiwan and entities formed under its laws shall have capacity in its or their own name to enter into and perform international agreements both public and private and to sue and be sued before the courts of the United States; and (e) the courts of the United States shall give effect to the laws and judgments of the courts of Taiwan in accordance with conflict of law and comity rules applicable to states with which the U.S. maintains full diplomatic relations.

#### SUMMARY AND CONCLUSION

In spite of the disappointingly weak agreement obtained by the Administration in its negotiations with Peking and the equally unsatisfactory terms of its proposed omnibus legislation, the American Chamber of Commerce in the ROC believes that Taiwan can continue to prosper, to maintain its freedom and to be an outstanding partner in trade and investment if the Congress acts resolutely to maintain the substance of U.S. relations with Taiwan even though the form of those relations changes.

To reiterate, our recommendations for Congressional action include the following:

- A strong security resolution.

- Adequate assurance of modern defensive weapons.

- Provision that MFN status, access to U.S. technology, Ex-Im financing and other benefits sought by the PRC will be denied or withdrawn if either military or economic coercion is used against Taiwan.

- Continued availability of OPIC political risk insurance for American investments in Taiwan.

- A directive to the Executive Branch that the laws of the United States, including but not limited to the anti-boycott legislation, shall be interpreted and enforced so as to provide the maximum possible protection to Taiwan.



A clear indication that the omnibus legislation means the government of the ROC, however denominated, when it refers to "the people on Taiwan."

Agreement between the U.S. and Taiwan shall have the force of law.

Agreements in effect on December 31, 1978, shall continue in effect (except for the Mutual Defense Treaty after January 1, 1980).

Such agreements shall not be terminated without prior Congressional or ROC concurrence.

Under U.S. law:

Taiwan is not part of any communist country;

No communist country has jurisdiction over Taiwan, its residents or property;

Taiwan shall have all attributes of sovereignty;

Taiwan shall have capacity to contract, sue and be sued in its own name; and

U.S. courts shall recognize and enforce laws and judgments of the ROC.

We would also urge the Congress to take notice of the ongoing negotiations between the State Department and the Foreign Ministry of the ROC. Under the February 28th deadline imposed by the State Department, the ROC is threatened by a complete rupture in all relations—cultural, scientific, commercial and otherwise—with the U.S. government unless it accedes to terms which it believes are against the interests of its people and which may also jeopardize private commercial relations, with far-reaching implications. The State Department is even threatening to close many of Taiwan's consular offices in the U.S., though such offices perform no government-to-government role and facilitate the very people-to-people relations that the President has said he intends to encourage. Unless action is taken to prevent it, the State Department may achieve a fait accompli and deprive the Congress of adequate opportunity to consider and act upon many of these issues.

Without the provisions first listed above, the President's announced goal of maintaining "business as usual" with Taiwan will be difficult if not impossible to achieve. The prompt enactment of appropriate legislation reflecting such terms is not only in the interest of American business in and with Taiwan, but is necessary to meet our country's moral responsibilities to Taiwan and its people.

Mr. WOLFF. We will now call upon the next witness, Mr. Winston Lord. Mr. Lord is the president of the Council on Foreign Relations, and a former chief of the Policy Planning Staff at the Department of State under Dr. Kissinger during the time of the opening to China in 1972.

Mr. Lord, your first trip to the Hill was before this committee.

Mr. LORD. Yes, Mr. Chairman. It is nice to be back.

Mr. WOLFF. I don't know whether this is the second time you have appeared.

Mr. LORD. It is the second time that I appear with official testimony.

Mr. WOLFF. We are very happy to have you here. As is customary with the committee, if you don't mind, the staff director will administer the oath.

Mr. PALMER. Mr. Lord, do you solemnly swear or affirm that the statements you are about to make will be the truth, the whole truth, and nothing but the truth?

Mr. LORD. Yes, I do.

Mr. WOLFF. You may proceed.

#### STATEMENT OF WINSTON LORD, PRESIDENT, COUNCIL ON FOREIGN RELATIONS

Mr. LORD. Thank you, Mr. Chairman. I would like for a moment, if I could, to say a word about Ambassador Dubs. I knew Ambassador Spike Dubs and respected him. As an American citizen, and

also as a former Foreign Service officer, I would like to express my sympathy to his family, his friends and colleagues, Mr. Chairman, about this tragic loss.

With your permission, I have a few informal remarks about some of my general views, and then I will be glad to take your questions, if that would be helpful.

I welcome the opportunity to appear before this committee, given my great interest and involvement in United States-Chinese relations. As you may know, I worked directly and continuously on these issues from the very first contacts in 1969, through all the trips and all the meetings here and in China, including those with Chairman Mao, Prime Minister Chou En-lai, and Vice Premier Deng Xiaoping up until January 1977.

I have followed these issues with great interest ever since, including a meeting with the Vice Premier a couple of weeks ago at Blair House, where I attended a breakfast.

Throughout this entire process, I have favored improved relations with the People's Republic of China, and I have also been concerned with the future of our good friends on Taiwan. I think these goals are and remain compatible.

#### NORMALIZATION SUPPORTED

The improvement in United States-Chinese relations during the last decade, I think, is one of the major positive trends in the international situation. It is in the American interest, it seems to me, for many reasons, most importantly with regard to world stability and stability in the Asia-Pacific region. It eases our security problems, provides more flexibility for our diplomacy, and also there are the economic, cultural, and other benefits which we derive from dealing with one-quarter of humanity.

I also think that these relations can and should help our relations with Moscow, if they are handled correctly. Clearly, this is a delicate task, but we saw in the 1972-73 period that we could have very good relations with both at the same time, and I think that this can be done again in the future.

#### UNITED STATES-CHINA-SOVIET BALANCE

I don't think our relations with China should be anti-Soviet. On the other hand, it seems to me that the Soviet Union should know that we are very concerned about its behavior in various parts of the world. If it does not show restraint, it will risk forging a tacit alliance between the United States, Japan, China, and Western Europe.

In short, I believe our relationship with the PRC should not be provocative to Moscow, but that it can be used to induce better Soviet behavior and cooperation.

In this context, I support the normalization of relations with the People's Republic of China as one means of solidifying our ties. I think it is important to remember, however, that the key factor for the Chinese has always been, during the last decade and will remain, their assessment of American strength, staying power, and sense of responsibility in the world. If we appear to be withdrawing from our



global responsibilities, normalization by itself will not guarantee good relations with Peking.

#### TAIWAN'S FUTURE

I understand that this committee may be particularly interested in the question of Taiwan's future security and prosperity, and I would like to make a few comments on that issue. I think it is a key issue both for the U.S. position in the world, and because the people on Taiwan have been good friends who, I think, have behaved with decency and restraint during a very difficult period for them.

When you are outside the Government, particularly when you used to be inside the Government, it is always easy to second-guess or quarrel with the timing of the administration's moves, its tactics, the specific terms of any particular agreement. My instinct is to refrain from engaging in that natural exercise.

I basically support the administration's recent move to normalization. Without having seen the detailed negotiating record with the Chinese, I cannot be sure whether we could have gotten a stronger package with regard to Taiwan's future. Frankly, I wish that we had. Nevertheless, certain elements in the normalization agreement have been very important and very helpful.

The provision for unofficial presence in Taiwan and here, which I know the bill you are considering is very relevant to; the prospective maintenance of full cultural and economic and other ties with Taiwan; the fact that we are terminating the Mutual Defense Treaty in accordance with the provisions of that treaty rather than abrogating it; the fact that we will continue to sell defensive arms to Taiwan; and the unilateral statements by us and by Peking—all these have been helpful and important.

However, I would like to have seen somewhat more reassurance on Taiwan's future by both sides at the time of the December announcement. It would have eased concerns at home and abroad, and it would have eased the present debate here on the Hill, the work of this committee, and the committee in the Senate.

In any event, Mr. Chairman, I think objectively Taiwan's security looks safe for the foreseeable future. I know other people have testified to this issue, so I will not go into detail; but I would point out that it does have strong defense forces, and we will continue, I trust, to provide them with defensive arms.

#### MILITARY RISKS FOR PEKING

There are 100 miles of water separating Taiwan from the mainland. Peking does not have the amphibious capability to make an attack, and I have seen no sign that they are building one. In any event, if they were to launch such an attack, they would have to build up for it for a long time, and it would have to involve major Chinese forces in order to attack the strong defenses on Taiwan. This, in turn, would leave Peking exposed on its Russian border, not to mention its Vietnamese border.

Also, very importantly, Peking would know that a move against Taiwan would have major adverse impact on its relations with the United States, with Japan, with other countries in Asia, and indeed with the whole world. It would thus be putting in serious jeopardy its

geopolitical goals and its modernization objectives. This is not to mention the counteractions that the United States might take in such a situation.

These objectives factors will be there in this situation for the coming years, no matter what the leadership in Peking. Certainly the recent and present leadership have made clear in statements that they have no sense of urgency or militancy on this subject.

#### CONGRESSIONAL ROLE ENDORSED

Having said all this, I still believe an expression by the Congress of concern for Taiwan's future is important, and that it would be a very helpful signal to the world and to all the parties directly involved.

I am not courageous or indelicate enough to comment on the merits of particular language of particular resolutions, Mr. Chairman. I will say, in general terms, I do believe that it should be a quite firm statement of congressional views, obviously without being overly provocative to Peking.

Then, in addition to whatever the U.S. Congress says, it seems to me that it might be helpful to take note and to incorporate in your resolution the various reassuring statements that Peking's leaders themselves have made on this issue.

Thank you, Mr. Chairman.

Mr. WOLFF. Thank you very much, Mr. Lord. We are very happy to have the benefit of your experience and advice in this situation, since you did play a key role in opening up China.

I would like to go back to some statements that you have made, with reference primarily to the agreement that has been reached at the present time. I take it that you have seen the basic outline of the normalization agreement.

What difference is there in this agreement to the tentative agreements that were made in the past, during your tenure?

Mr. LORD. I think it is clearly along the lines that were intended by Presidents Nixon and Ford. Under these administrations, there were never detailed negotiations on the terms of an agreement. The general intention and direction of the United States toward normalization were expressed in private conversations that were reflected in the Shanghai Communique and other documents, but we never got to the point, in our conversations, of trying to figure out what the detailed elements would be.

I would say that the basic outlines that have now emerged are quite consistent with the direction that the previous administrations were planning to take.

#### PRIOR PLANS

Mr. WOLFF. Do you recall that at one time we were prepared to enter into an agreement for normalization, which I believe places the time frame sometime shortly after the last election. Am I correct in that?

Mr. LORD. I think that we have to consider several phases. President Nixon, and Secretary Kissinger on his behalf, made it clear that he really intended to move to normalization in his second term. Very frankly, Watergate interrupted that process.

My own instinct is, but I cannot be sure, that there would have been a concerted effort to try to negotiate an agreement in President Nixon's



second term if Watergate and other factors had not intruded. In any event, that was his intention.

I cannot say what those terms would have looked like, but I think that is one source of delay that occurred.

Second: I think President Ford probably would have tried to negotiate the details of an agreement if he had had a second term. I think that the combination of having a very short period in office, plus the fall of Vietnam and its psychological impact, dissuaded him from entering into detailed negotiations.

Mr. WOLFF. One thing that we are trying to learn here is whether or not there was a tentative agreement arrived at during the period of your tenure, and whether or not there were constraints or changes that have occurred with the new administration coming into power.

Now we have found that there was an agreement reached in one particular economic area, a tentative agreement in one particular economic area. I am wondering now whether or not there were any other agreements of which you can inform us that we are either carrying through, or not carrying through today.

#### NO SECRET DEALS

Mr. LORD. There were no secret deals or agreements, Mr. Chairman. As to the tentative economic agreement, I don't know what you are referring to. The one that I can recall is the Claims and Assets. We were on the edge of an agreement and then we did not follow through with it. Both sides backed off, primarily the Chinese. Perhaps that is the one that you are referring to, and that was public.

Mr. WOLFF. I don't want to label these "secret," or anything like that. What I am trying to find out, are we constrained today by some previous, not necessarily commitments, but trends of negotiations.

Mr. LORD. It depends on what you mean by constraints. I think the quick answer is no. I think that it is clear that you had two Presidents expressing views in private, and this was also reflected in the Shanghai Communique, that we wanted to normalize, and there were careful statements on Taiwan.

Mr. WOLFF. The situation with Taiwan as it exists now—in other words, one China—was that part of the negotiating procedures during your tenure?

#### SHANGHAI COMMUNIQUE

Mr. LORD. Yes, and that was reflected in the Shanghai Communique.

Mr. WOLFF. We are different from the Shanghai Communique now.

Mr. LORD. That is correct. There has been a further step forward. I don't have the language in front of me, but in the Shanghai Communique, each side stated its position.

Mr. WOLFF. We acknowledged that each side had stated its position.

Mr. LORD. That is right.

Mr. WOLFF. But we have now acknowledged that there is but one China.

Mr. LORD. That is right. I think that the exact language of the December 15 agreement is that we acknowledge the Chinese position that there is one China.

Mr. WOLFF. It is a nuance.

Mr. LORD. I agree. It has been carried a step forward. In all fairness, I think if previous administrations had to conclude a final deal, as this one did, it probably would have had to carry the Shanghai Communiqué language on Taiwan slightly more forward. I think that that part of it is consistent.

Mr. WOLFF. Is there any difference in the U.S. position toward Taiwan today than there was during the period of your tenure?

Mr. LORD. Basically not, Mr. Chairman. I said in my opening remarks that I would like to have seen slightly stronger statements by us, and maybe incorporation of Chinese statements about Taiwan's security.

The reason that it is difficult to compare the two periods is that, as I mentioned earlier, we did not get into detailed formulas in the private talks. The Presidents indicated directions and the Shanghai Communiqué indicated directions, but we are comparing now a specific normalization deal, and trying to figure out whether the previous administrations would have gotten a better or different deal. It is very difficult.

Mr. WOLFF. Some people have said that we have turned over the people of Taiwan to the People's Republic of China. I don't mean the politics of the situation. I want to try to put this in an historical perspective.

Do you feel that we have gone further than what was originally anticipated?

Mr. LORD. I would again say, basically, no. I would again say that I would have liked to have stronger statements. If you want a flat answer, I would say, no. I think that the previous administrations would have tried to get the best possible statement of reassurance that could have been gotten, and they may have come up with a stronger statement.

#### PEACEFUL RESOLUTION ON TAIWAN

Mr. WOLFF. Did you, at any time, ask for a nonviolent unification of Taiwan?

Mr. LORD. We never got a deal like that. We made it very clear, consistently, as I understand this administration has, that we would expect a peaceful solution to that issue.

I think, in all fairness, the previous administration would have bargained hard, and tried to get the best possible statement. I think that it is probably impossible to have gotten Peking to formally renounce, in a joint communiqué, the use of force. I think that it is very difficult for them to do.

It does not mean that we would not have been able to bargain for a slightly more reassuring statement by them. Certainly the President, in his announcement, should have, or could have, strengthened our unilateral statements on Taiwan. The fact that we did not do that makes all the more important, in my opinion, that the Congress express its views on this issue.

I would like to be more precise, but we had a situation where the Presidents and Dr. Kissinger were indicating the directions of our policy, but we never got into detailed deals, or agreements. Therefore, we have to speculate on if Nixon or Ford had carried through to a specific deal, how it would have looked versus what this administration got.



I am telling you that I think it is fairly close, but maybe we could have gotten something better on reassuring Taiwan. I think stronger unilateral statements by the United States could have been made. But I don't think that there is a dramatic diversion from the expectations and the direction of previous administrations.

Mr. WOLFF. Thank you, Mr. Lord.

Mr. Pritchard.

Mr. PRITCHARD. I think you will probably agree with me that it is a great technique when you take statements that were made in previous administrations, and use them where they fit, where they help. Then the people in the former administration are rather helpless to say very much about it, as their statements are used or not used on a selected basis.

I have several things. It seems to me that the administration and the Chinese always talk about how peacefully these two entities will be getting along together.

What is your impression of that? Are we closing the door on the independent Taiwan?

#### TAIWAN'S CHANCES FOR INDEPENDENCE

Mr. LORD. I would not say that we are closing the door. I think that there are obviously various sentiments on the island, and I don't pretend to be an expert. I am sure that there are those who would like to be independent. And even among those who do not want to be formally independent, I am sure that there are many who want to maintain their system of economics and their political system, and their de facto independence from the mainland.

I think there is a chance that over time the first economic ties will begin between the mainland and Taiwan, and it seems to me that it is conceivable that political talks could open—the basic deal is very hard to envisage, but I would imagine for a considerable period of time there would be great autonomy for the people on Taiwan and their system.

Whatever the views on Taiwan, I am sure they like their economic system, and they want to maintain at least de facto independence. But that is a little different than declaring themselves a formal independent state, which would face us with very difficult choices, on the one hand with Peking, and our relations with them, and on the other hand, with the whole issue of self-determination and human rights.

So I don't think that what we have done has materially changed that inherently ambiguous situation. I think the people in Peking, in any event, care about the international situation, their geographical position. Taiwan is a matter of great principle to them, but they are really very patient on it, and I don't see them as being particularly militant. As we have discussed, in any case, they do not have the capability to do much about it anyway.

They have made several statements just in recent weeks about Taiwan's being able to maintain its system, its economic activities, even its self-defense forces. I think these statements plus the statements of patience and hope by the Chinese that the issue will be settled peacefully are all helpful.

These elements might be useful, I think, in a congressional resolution, for you to take note of these, and say that we are basing our relations on these expectations, that this issue will be solved peacefully.

#### BOYCOTT OR BLOCKADE

Mr. PRITCHARD. You don't see the possibility of boycotts and blockades?

Mr. LORD. That it seems to me is a less unlikely possibility than a frontal assault because it is a little more ambiguous, and a little easier to pull off. However, they still face the risk—they being Peking—of endangering their relations with us, with Japan, and with the other countries of Asia, indeed around the world. They have some very strong incentives on the economic side for the modernization program, not to mention the geopolitical balance, and their concerns with the Soviet Union and Vietnam. I think that these would be paramount rather than their concern to squeeze Taiwan.

I think that they are going to treat Taiwan, for the foreseeable future, like they are treating Hong Kong and Macao.

Mr. PRITCHARD. The testimony by Dr. Peng and Congressman Leach urged us to make a strong appeal and put language in our legislation which, in essence, says that our relations with the people on Taiwan is going to be tied to the amount of democracy or greater participation which they allow the Taiwanese. Do you have any comment on that?

Mr. LORD. I would not approve of that approach. I believe strongly in human rights as a principle of our foreign policy, but I think that we should be very careful before we start issuing directions to other societies and telling them how to run their business.

I am sure that the system on Taiwan is not a perfect democracy. There are very few perfect democracies around the world. I would hope, and I would think, that there would be further improvements in that system, but it is certainly a less oppressive system than most other countries.

It seems to me that certainly the economic benefits of the people have been very great indeed. So, to answer your question, I would not tie this kind of element into any package that you are shaping.

#### MOST-FAVORED-NATION STATUS FOR PEOPLE'S REPUBLIC OF CHINA AND U.S.S.R.

Mr. PRITCHARD. Finally, the most-favored-nation status which is really nothing more than normal trade relations is envisioned for China. Do you think it would be wise for us to give them that status if we did not, at the same time or very close to it, do the same thing for Russia?

Mr. LORD. I think that it partly depends on Soviet behavior, frankly. This is a very difficult issue for the administration. On the one hand, if you look at the provisions of Jackson-Vanik, the Stevenson amendments, and so on, with regard to human rights and emigration, I don't think we can claim that China is a perfect center of democracy.

There have been some greater expressions of free political views there recently, and certainly the emigration policy seems to be loosening



up. Nevertheless, it would be inherently somewhat of a double standard to apply it in one place and not the other. Then you have the further problem of whether it looks like you are becoming anti-Soviet in your China opening.

On the other hand, obviously the economic dimension is increasingly important in our relations with Peking and MFN would be a significant element. You would have to clear away, I guess, the claims-assets question, and some other technicalities as well.

To answer your question, my own view is that this is not a good time to reward the Soviet Union with MFN given some of its activities around the world. I could further add that economic relations go somewhat hand-in-hand with political behavior and atmosphere. Yet on the other hand, I am reluctant to move on the Chinese side without moving on the Soviet side.

So I am giving you a very ambivalent answer. I think it is a very tough question.

Mr. PRITCHARD. If you were in our shoes, you would not know how you would vote at this time, I guess.

#### ROLE OF LINKAGE

Mr. LORD. That is a fair point. I don't link everything in Soviet relations to their behavior. I tend to insulate SALT, for example, because that to me is a deal that you make either on its own merits, or you don't make at all.

On the other hand, I think that trade relations is something where some linkage is desirable. I am basically in favor of MFN for the Soviet Union, and I flatly oppose the congressional approach to that. I don't think that this was a wise move at all. I think that it has defeated the objectives of emigration, and human rights, as well as our economic objectives.

But I am not sure that this is a psychologically good time, given Soviet behavior in certain parts of the world, to make that positive move.

I know that you asked me about China relations, and not Soviet relations, but I wanted to make those comments.

Mr. PRITCHARD. I have some serious reservations about giving China most-favored-nation status if we don't do it for the Soviets.

Mr. LORD. To try to answer your question a little more precisely. I would prefer to do it in tandem as a basic principle. My only hesitation now is that I think psychologically, given what has happened in certain parts of the world, this is not a time I would have chosen to improve our economic linkages with the Soviet Union.

Mr. WOLFF. Mr. Hall.

Mr. HALL. I have no questions, Mr. Chairman.

Mr. WOLFF. Mr. Mica.

Mr. MICA. No questions, Mr. Chairman.

Mr. WOLFF. Since my colleagues have passed to me, maybe I can go again.

#### THE 1972 PLANS FOR TAIWAN

At the time the discussions took place, was it envisaged that there would be continued Government-to-Government relations with Taiwan?

Mr. LORD. I think that it was always recognized that we could not have our cake and eat it, too, in this respect. If and when, as was our intention, we moved to recognize Peking, we would have to have an unofficial relationship with Taiwan.

Mr. WOLFF. In other words, the "Japanese formula."

Mr. LORD. We are not talking about the security side, but the economic and political side. Basically, the Japanese formula, that is correct.

Mr. WOLFF. What about the security treaty—was it envisaged at that time to break the security treaty?

Mr. LORD. I think it was understood again that we could not maintain the security treaty, once we shifted relations. So we were concerned about the security of Taiwan, but we knew that this would have to be taken care of in other ways, such as arms sales and statements by both sides, to replace psychologically and materially the security treaty which would have to go when we shifted relations.

#### ARMS SALES TO TAIWAN

Mr. WOLFF. I am in a position where I find it very difficult, we almost are in an "Alice in Wonderland" picture, where we put off to another day the problems that are actually implicit in this type of arrangement.

How would we act, if during the violence that occurred in the United States in the 1960's, someone decided in Europe, or if the Soviets decided that they were going to send arms to the students and others who were terrorizing here in the United States. How would we have handled that?

Mr. LORD. We would not like that, but I am not sure that this is an exact parallel, if you mean arms to Taiwan. Is that what you are getting at?

Mr. WOLFF. I am talking about arms to a state. Suppose we had a state that decided that—I remember at one point Mr. Goldwater said we should saw off New York City, and let it float out. Maybe somebody would want to give arms to New York, how would we feel about that?

Mr. LORD. We would not like it, obviously.

What you are getting at is that Peking considers Taiwan, in effect, one of its states. I think that the administration's position is basically sound on this. I don't think that we should sell arms directly to Peking. I would be inclined to let our allies, or not stop our allies from selling defensive weapons to Peking, and I think we should be continuing to sell defensive weapons to Taiwan.

So the basic administration position, as I understand it, is one that I would support.

Mr. WOLFF. Now, within our own constitutional framework, none of the United States can make any agreement with a foreign nation. I take it that it is part of our constitutional structure. Yet, if we agree to the fact that there is one China, talk about the peaceful unification and everything else, how can we continue to do business with that one state or province, or entity, which is part of the one China?

Mr. LORD. There is no question that this is a very ambivalent if not unprecedented, diplomatic, legal situation. I would say that this is



more of a problem for Peking than for us. They are willing to live with it, and it is serving our purpose. If it does, I think we should do it.

Certainly there are some unusual aspects to this. The whole question of the American Institute in Taiwan, and the Taiwanese instrumentality here is a rather novel departure. But I think that we should be pragmatic, and look at the substance rather than the legal trapings, or the cosmetics of it.

#### MAO AND CHOU ON TAIWAN

Mr. WOLFF. When you were talking to the authorities on the mainland, was there unanimity between Chou and Mao on this question of normalization?

Mr. LORD. I did not detect any differences between them in our conversations. Again, I want to emphasize that easily 90 percent of our conversations with Chou, with Mao, with their foreign ministers, with their Ambassadors, were on the international situation. There was not that much discussion on Taiwan. But we did not detect any differences between Mao and Chou. They both clearly put the geopolitical situation first.

The U.S. reputation as a world power was much more important to them. Taiwan to both Mao and Chou was a matter of principle, but one on which they were patient, and not particularly militant. So, I did not see any difference.

#### PEOPLE'S REPUBLIC OF CHINA INFLUENCE ON VIETNAM WAR

Mr. WOLFF. One factor that has surfaced in our conversations with Deng was the importance of attempted encirclement by the Soviet Union of China today, and the recent tensions that exist between China and Vietnam.

In the discussions that were held with China, do I understand they did render some assistance to us in those days in helping resolve or speed the resolution of our Vietnam involvement? Am I correct on that?

Mr. LORD. That is correct. I would not exaggerate this. It was more a matter of giving Hanoi a sense of isolation from its two big brothers, because after the Peking summit there was the Soviet summit in the middle of the hostilities as well. So, both Moscow and Peking made it clear to Hanoi that they put their relations with us above their relations with their fraternal and ideological allies.

In this sense, it was one more inducement to Hanoi to make a negotiated settlement. My guess is that Peking—in fact, I am sure Peking wanted the Vietnam war, or at least the U.S. involvement, out of the way, because it was an ideological irritant in their bilateral relations with us.

In fact, our relations improved considerably, with the establishment of liaison offices, just a couple of weeks after the end of the U.S. involvement in Vietnam.

So, I think they probably said to Hanoi, "Why don't you make a deal, and get the Americans out. Then South Vietnam will fall into your hands. But don't insist on the Americans overthrowing Thieu, or putting in a coalition government."

I think they wanted a military settlement, the kind that we basically got. They probably counseled Hanoi. My guess is that they did not press overly hard because they had to worry about the Soviet influence on Hanoi, and they did not want to be pressing Hanoi more than the Soviets were.

So they were helpful, but not in a direct, great pressure way.

#### SOURCES OF PRE-VIETNAMESE CONFLICT

Mr. WOLFF. Do you feel that there is any connection at all between the lack of help, or benign neglect, or whatever there was involved in this at that time, and Vietnam's position today; or the conflict that exists between Vietnam and China?

Mr. LORD. I don't think so, Mr. Chairman, because in a way, Moscow was even more brutal with Hanoi. Within 1 week after the mining of Haiphong and bombing around Hanoi, they welcomed Nixon to Moscow.

So, Hanoi would have been equally irritated at both its allies. I think the Vietnamese-Chinese conflict now is based on long, historical animosities, on overseas Chinese, on Vietnam being an agent of the Soviet Union, as Peking sees it. I think that these are the factors that are contributing to that conflict, and not Peking's attitude toward the Vietnam settlement.

Mr. WOLFF. What do you think is going to be the ultimate resolution?

Mr. LORD. In Indochina?

Mr. WOLFF. Yes; in Indochina.

Mr. LORD. None of us is sure, obviously. As you indicated, this was a primary issue on Deng's mind when he was here on his trip. If I have to guess, it seems to me—again this is pure speculation—that the Chinese are massing forces on the Vietnamese border, probably not to invade, which would leave them possibly susceptible to Soviet counter-response, but to draw the attention of Hanoi's troops and Hanoi's allies in Cambodia, stretch them thin, and allow the remainder of the anti-Vietnamese-Cambodia forces to continue their guerrilla activities while the Chinese resupply them.

So, my guess is that they would like to teach Vietnam a lesson in their terms. If I have to guess, they would probably do it in this way. There may be some border incidents.

The ultimate resolution, I don't know, because the Cambodians dislike the Vietnamese, and vice-versa, so much that they would prefer even a Pol Pot government with all its brutality to a Vietnamese puppet regime. So, I think that there is considerable potential for things dragging on, very frankly.

Mr. WOLFF. Thank you very much.

Mr. Pritchard.

Mr. PRITCHARD. Thank you very much, Mr. Chairman.

While we have Mr. Lord here, I am glad to have the chance to ask him some questions.

#### NEED FOR PRC RESTRAINT

When Vice Premier Deng was here, somebody asked him about turning off the guerrillas who were up in northern Thailand. I think you



and I would agree that it has become very crucial in that area. He said something to the effect that "Well I can do that as a matter of nation-to-nation, but I can't do it from party-to-party."

Now, is that consistent? Has this always been their position that even though they run the shop, they can't turn the party around?

Mr. LORD. It is a little disingenuous, let's face it. They have split motives in Southeast Asia, for example. On the one hand, they want to improve government-to-government relations with these countries, including Thailand, particularly because they are worried about Hanoi and the Indochina Federation dominated by Hanoi.

On the other hand, they don't want to completely throw away their revolutionary credentials, although this is much less important to this regime than previous ones.

So they have never brought themselves, to my recollection, to be willing to admit that they will stop the guerrillas. I don't know enough about the details of the guerrilla movement in Thailand to know whether if China cut off its support, it would dry up, or whether the North Vietnamese are feeding it sufficiently that it would continue anyway.

Mr. PRITCHARD. But it would be helpful.

Mr. LORD. It would be helpful.

I think in our ongoing relationship with Peking that we should have serious talks with them about what can they do to help stabilize the situation in various parts of the world and in Asia. For example, in Korea, can they be helpful there? Another example is in Thailand. I think we could have serious talks, and I think we should.

Mr. PRITCHARD. That was my next question. How much help can they be with the North Koreans. Would you agree with me that I don't think we have used our leverage as well as we should, and don't they expect us to lean on them in those areas?

Mr. LORD. They are very hardheaded and very practical. I would think that they expect us to defend our interests. There is only so much that they can do. I think that they probably can do more than they have.

For example, in Korea, it is tricky with them, with the Soviet role also being crucial, and they are jockeying for position with the Soviets. For them to get out in front of Moscow in pressuring North Korea to be reasonable, is difficult for them, and we have to take these kinds of factors into account.

I would say, on a more general point, that one of the major pluses in our relationship, even before official normalization, over the recent years as well as now, and hopefully in the future, is our parallel interests in various parts of the world. This is something that is very hard to quantify, where they have been helpful. Thus, I don't want to leave the impression that they have not been helpful. I am sure other witnesses have pointed this out, but there is the fact that they are for a strong NATO. They put on no pressure to kick us out of our bases in the Philippines, or our presence in Thailand. They don't make Japan choose between us and them for good relations, and in fact stress that United States-Japanese relations are more important than Chinese-Japanese relations.

## MIDDLE EAST

They have quietly backed our effort in Middle East diplomacy because it reduces Russian influence in the region. These kinds of elements where they help behind the scenes are a major plus for us. It is very hard to explain to the American people or to quantify it, but it is to me one of the most important parts of the relationship.

So what I am saying is that I think that we can continue to work on these issues. And I would put particular emphasis on some of those Asian issues that you are referring to.

Mr. PRITCHARD. Finally, don't you think that the Vietnamese did not learn very much from the war that they were in with us?

Mr. LORD. You think that they are getting in a similar situation? It looks that way to me.

Mr. PRITCHARD. Doesn't that look like a very long involvement in which their choices are very difficult?

Mr. LORD. I think so, because there is the combination of continuing Cambodian hostilities and Vietnamese-Cambodian conflict due to ethnic reasons, the fact that the Chinese can put pressure on their borders, and the fact they have some problems in Laos as well, where they are influencing the regime.

Even for Hanoi, with its determination and military equipment, I think that they have their hands full. I agree with you.

Mr. PRITCHARD. Thank you, Mr. Chairman.

Mr. WOLFF. I was interested in one remark you made, Mr. Lord. How could that help us in the Middle East? I thought that they were against us.

Mr. LORD. Here again, it is whether you believe their U.N. rhetoric or whether you believe what they say behind the scenes. Sure, they are basically anti-Israel in the sense that they will not get out in front of any Arab countries in terms of recognition or deals.

But they have made it very clear in private, and I believe publicly, although with a much more guarded tone, that they welcome U.S. diplomacy—using both hands, for example, one with Israel and one with the Arabs—not out of any goodwill toward us or toward Israel, but because they think it reduces Soviet influence in the area.

So I would not exaggerate the help on this particular issue. But the fact that they certainly backed Sadat in moving away from the Russians a few years ago, and they back our shuttle diplomacy, I think is marginally helpful to us. Certainly, if they were vigorously opposing it, it would be marginally unhelpful.

Mr. WOLFF. Mr. Mica.

Mr. MICA. I don't want to cover what you have already covered. If you have already mentioned this on the record, let me know.

Mr. LORD. OK.

## KENNEDY-WOLFF RESOLUTION

Mr. MICA. I understand your concern with continued assurances from Communists about Taiwan. Have we been discussing the Kennedy-Wolff resolution?

Mr. LORD. No, we have not. I indicated in some informal opening remarks that I am reluctant to get into one resolution versus another.



I do believe that there should be some congressional expression of concern as to the future of Taiwan. But I am not really qualified, I don't think, to sit here and say that this resolution is better than that one.

I think that it should be strong, as I said in my opening remarks, but clearly at some point it gets provocative to Peking. So there is a balance.

Mr. MICA. Within the sense of the resolution that came before the Congress, would it be your opinion that whatever resolution we move on, or act on, ought to be within the bounds, or the scope of what the President agreed on, because if we don't, it is my understanding that it will negate the agreement, and the President would veto it. So it would have no effect. Is that correct?

Mr. LORD. It depends on what you mean by "the scope of what the President agreed on."

Mr. MICA. For instance, the normalization agreement: if we said in the resolution that we would have official ties, which is an extreme case. There is nothing that negates official ties, but precluded in government-to-government ties.

Mr. LORD. I am not sure of the difference. You could not do that. You cannot have government-to-government ties. You cannot have a mutual security treaty. This kind of agreement is obviously out of the picture. But I don't think that anybody is suggesting any one of those two, at least in the resolution. Maybe they are, but you could not do that. You are right.

What you could do, though, is state that the Congress notes all these statements that have been made by Peking, the reassuring statements, and is basing expectations of future relations with Peking upon this kind of approach. It could express its own concern for the future security and prosperity of Taiwan.

It could say a lot of things that were not said either in the communique, or by the President in his speech, or by the U.S. statement in December, that would not negate the agreement, but would make it very clear that the Congress as well as the administration is concerned that this issue be settled peacefully in the future.

Mr. MICA. Am I correct that these things could go in the report and have the same effect?

Mr. LORD. I am not a legislative expert. I would have thought that there would be much more force in a congressional resolution. I am not sure of the precise situation you are in. I would think that a resolution would have much more strength and credibility than just a committee report. It is presumably something that the whole Congress votes on. It is more official action than just a report on the opinions of the committee. Am I correct on that?

Mr. WOLFF. The resolution is a fine line document. The whole resolution will be based on the report, as I understand it. The report is the legislative history.

Mr. MICA. Is there any specific wording that you feel, that you have thought about that would be adequate?

Mr. LORD. I am really reluctant to give any specific language. I do think that there ought to be expressions of Congress concern for the security of Taiwan, that the issue be settled peacefully, that United States-Chinese relations can only prosper with this kind of prospect.

That kind of approach, perhaps noting and incorporating reassuring statements that the Chinese leaders themselves have made. But I am not prepared to spell out the active parts of what the United States would do in such a situation. I do think that it has got to be very carefully done.

I want to make clear that I do think, for the reasons that I said earlier, that such a resolution would be helpful. At the same time, I strongly support normalization. I said earlier that I think the basic agreement is a good one, and I would not want to go so far as to be overly provocative to Peking.

#### EFFECT OF KENNEDY-WOLFF

My view is that we would not hurt our relations with Peking by some expression by the Congress of concern. It seems to me that Peking is interested in whether the United States is a credible world power that can and will stick by its friends, even if it cannot say so publicly, for obvious reasons. Privately it cannot be too angry to see that the U.S. Congress is concerned about the future of people that we have been dealing with for many years, and who have been very decent.

Furthermore, it is not in Peking's interest for the situation in Taiwan to become wholly destabilized, for the people there to become panicked, or consider options that Peking would not like, and would face all of us with difficult choices.

So I think that there are some arguments that it is even in Peking's interest that we show that we stick by our friends. But we have to do this with care, and not be provocative because of the principle of one China which Peking holds.

Mr. MICA. Let me just add if I may. Even before I became a member of this committee, I shared your concern and the concern of many people around the country about the safety and security of Taiwan. It is becoming evident to me, as these hearings progress, that we will have some type of resolution. I am cosponsor of the Kennedy-Wolff resolution, which embodies a major concern in this Nation, and if the Chinese Government does not recognize it now, with or without this resolution, then they probably don't understand the basis of anything else we have done with them either. It has to be acknowledged and I think it will be.

So I share your concern, and I support it. But I think if the Vice Premier left here with any knowledge of what was going on in this country, he knows our concern for Taiwan.

Mr. LORD. I agree completely. Successive administrations have made this clear in every conversation. So they could be under no illusions.

I also said in my remarks before you got here that objectively the security of Taiwan is assured, it seems to me, in terms of the defensive forces, and Peking's worry about its other borders, and its amphibious difficulties, and the direct impact on relations with us.

So what we are talking about here is something that is more symbolic, but nevertheless important, an added sense of U.S. responsibility.



## CHINA AND THE MIDDLE EAST

Mr. MICA. If there is no objection, I would like to ask one additional question.

I noted your comment on the Middle East-Chinese influence. Do you foresee in the immediate future that they would be helpful in the Middle East situation, particularly Israel, and the agreement.

Mr. LORD. I am sorry, I did not understand the question.

Mr. MICA. Do you see any area where the Chinese will be helpful in our dealings, or our present problems in the Middle East.

Mr. LORD. Only marginally. I don't think that they have tremendous influence in the Middle East, to be honest. I am sure they have discussions with Sadat. My guess is, and I just speculate, that they would indicate that they certainly are not opposed and probably favor a followthrough on the Camp David agreements, if only because, as I said earlier, this reduces Soviet influence.

To answer your question, I don't see where they can be particularly helpful in the Middle East in any significant sense, given the other powers at play and the other leverages. I don't think that they can play a particularly important role.

Mr. MICA. Do I understand correctly that they are generally in support of what we are doing?

Mr. LORD. Yes, obviously more privately than they can be publicly. But they support anything we do which they think reduces Soviet influence, whether it is the Middle East, Europe, or anywhere else. What counterbalances the Soviet Union is good from their standpoint.

However, in certain areas they can be more helpful than others. In Asia, they can have more influence in a place like Korea, or ASEAN, than they can in a place like the Middle East, where they have less relative influence, it seems to me.

Mr. MICA. Thank you, Mr. Chairman.

Mr. WOLFF. Mr. Lord, I think to underline what you have said about the U.S. credibility, so to speak, there was a statement made by Deng regarding our position with Iran recently, about the fact that he felt that we were not as forceful as we should be in protecting the forces in Iran. This lends further credibility to the statement you have made about their feelings regarding our actions following our words.

Is there anything else that you would like to add, Mr. Lord?

## NORMALIZATION SUPPORTED

Mr. LORD. I might just comment, Mr. Chairman, that the thrust of our exchanges since my opening remarks has been on the future of Taiwan, and the assurance of that future. I stick by that. I am concerned about it.

I would not want to leave any impression, because of the emphasis of the exchanges, that I am not strongly in favor of better relations with Peking for which I have worked personally for many years.

As I said at the outset, I think that the basic deal which has been struck is in the U.S. interest. I support it. I might quarrel with some of the details of the negotiations, but I am not here to be critical. However, I feel that the Congress might help.

I want to leave you with the impression that I am strongly in favor of good relations between us and the People's Republic of China, including normalization as one part of that. I am also concerned with the future of Taiwan. I do think these two concerns are compatible.

Mr. WOLFF. Thank you very much. If I may summarize, you leave us with the assurance that there have been no prior agreements, no secret agreements, or anything else like that, that would be a constraining influence upon our future relations there, and our ability to be able to strike the best possible deal with them.

Mr. LORD. That is correct.

Mr. WOLFF. Thank you very much. We appreciate very much your coming before us.

We will take a short recess, and then hear from Ambassador McConaughy.

[Recess.]

Mr. WOLFF. Our next witness will be the distinguished Ambassador, who served for many years as Ambassador to the Republic of China—Taiwan—Hon. Walter McConaughy. I had the pleasure of meeting the Ambassador during several trips that I made to that region, and we are delighted to welcome you.

Would you step forward, Ambassador, and the staff director will swear you in.

Mr. PALMER. Do you swear or affirm that the statements that you are about to make are the truth, the whole truth, and nothing but the truth?

Mr. McCONAUGHY. I do.

Mr. WOLFF. Before you proceed, could you identify yourself and your connection?

Mr. McCONAUGHY. Yes, indeed. Mr. Chairman.

#### STATEMENT OF HON. WALTER P. McCONAUGHY, FORMER U.S. AMBASSADOR TO TAIWAN

Mr. McCONAUGHY. Mr. Chairman, I am the former American Ambassador, career Foreign Service officer, retired in 1974. My duty in China included a brief assignment on the mainland, in Peking, in 1941, just before Pearl Harbor, and a while afterward; a tour in Shanghai, where I was consul and later consul general from 1948 to 1950. I was there at the time the Communists came in.

Then I was Director of the Office of Chinese Affairs at the Department from 1952 to 1957; Assistant Secretary of State for Far Eastern Affairs for a short period in 1961; and later Ambassador to the Republic of China on Taiwan from 1966 to 1974. I retired in 1974, and I have been in full retirement since then, no official connections since that time. I am a private citizen now.

Mr. WOLFF. We thank you very much for coming here and appearing before us today, and giving us the benefit of your advice and experience. Would you proceed?

Mr. McCONAUGHY. Thank you, Mr. Chairman.

I consider it a privilege to appear before your subcommittee, Mr. Chairman, and renew my cordial contact with you.

I think it would be understandable to assume that I might be somewhat biased in my view of recent developments considering my close



identification for many years with the conduct of our relations with the Republic of China on Taiwan.

I want to put it on the record that I am the honorary president and member of the board for the Committee for a Free China, headed by the distinguished American and former Member of the Congress, Dr. Walter Judd.

I have had no access to classified material since my retirement. I am speaking strictly as a private citizen, without any privileged information postdating April 1974, when I retired.

I want to say that, while there might be some natural human bias because of my close association with, and appreciation for the fine qualities of, the Chinese Government and the people on Taiwan, I will try not to be affected by localities. Of course, I speak as a private American citizen concerned primarily with the national interests of our country.

I happen to believe that, in many respects, the welfare of Taiwan is in our interest, and that Taiwan had been a very useful ally to us over the years. It is painful for me to take issue at all with the recent developments. As a career Foreign Service officer, I think that it is instinctive for me to want to support the current administration and our President in the area of foreign affairs, including the area of my specialty. I do support, in substantial measure, the move that President Carter made on December 15, when he announced the agreement with the Peking government.

#### NORMALIZATION ADVISABLE

I would particularly point out that I am not questioning the advisability of normalization, fully recognizing diplomatically the People's Republic of China Government in Peking. I recognize that after that government has been in power for 30 years, unchallenged power, really, the time has come for their recognition. The geopolitical as well as bilateral considerations make it advisable that we proceed with a reasonable offer of recognition.

As I am going to spell out a little later, I am not happy about the proposed arrangement for the continuing conduct of our very important relations with Taiwan. More about this in a few moments.

#### PROGRESS ON TAIWAN

I would just like to take a moment to recall what perhaps some of our people tend to forget. We have seen a phenomenal history of development and progress by the government and people on Taiwan, particularly since 1951, when our economic assistance started. In the 14 years that followed, up to 1965 when the economic aid was terminated because they did not need it any more, I suppose the most impressive record anywhere for efficient and productive use of our foreign aid was registered by the government on Taiwan. The success of the program there was frequently cited by AID and its predecessors as a model of how successful a foreign aid program could be with the right sort of utilization by the recipient country.

The government there has been a staunch and steadfast ally of ours all the way, in all the critical U.N. votes, and in such crises as the

Korean war and our involvement in the Vietnam conflict. So it is a relationship that we look back on with pride and satisfaction.

It does pain me to see the relationship now changed so abruptly and, it seems to me, so inconsiderately. It grieved me to see our seemingly studied neglect of the representatives of the Government on Taiwan, and the apparent tendency to disregard their interests and their sensitivities.

Even if we had to take the course toward the mainland which was decided upon in December, I think that we could have shown more concern for the sensitivities of our friends on Taiwan. Sometimes it seems that we have a tendency to show more consideration for our former enemies than we do for our friends.

#### SHANGHAI COMMUNIQUE

I want to say a few words about the problems that, it seems to me, may have been created for us by the December 15 agreement with the Peking government. That agreement was basically founded on the Shanghai Communique, which President Nixon signed with the Peking authorities in February 1972.

As already pointed out in these hearings, the agreement recently reached does not exactly follow that communique, but that communique did break the ground for the agreement reached last December. I think we ought to note carefully that at that time we did not actually state that we accepted the Peking position that there is only one China, and that Taiwan is part of that China. The phrase was that we did not challenge the Peking position. We did not say that we accepted it, but we did not quarrel with it either.

Now the government in Taipei hopefully believed that statement "does not challenge" simply meant that we did not choose to argue or debate the question in that particular forum, the forum of that communique. So they did not worry as much about any implication that Taiwan was a part of Communist China as might have been anticipated.

The second stipulation in the Shanghai Communique was that both countries would proceed as expeditiously as practicable to a normalization of relations. But the hopeful view of the government in Taipei was that normalization might not necessarily mean establishment of conventional diplomatic relations, at least not immediately. Perhaps "normalization" could mean something different in these days. It might mean finding new channels for diplomatic intercourse. Maybe the United States could find a formula for a fairly effective means of communication with Peking which would fall short of formal diplomatic recognition. Taipei knew that our formal recognition of Peking might mean a change in our relationship with the government on Taiwan.

Mr. WOLFF. If I might interrupt you a moment, Ambassador McCaughy?

Mr. McCAUGHY. Yes.

Mr. WOLFF. You were Ambassador to the Republic of China during the time of the communique—the Shanghai Communique—and thereafter during the time when we continued to pursue normalization procedures.



The statements that you are making now, are they the result of your conversations with various members of the administration, or people who have responsibility in that area, or are they your own suppositions?

Mr. McCONAUGHY. They are intimations that members of the Chinese Government on Taiwan gave to me. They hoped that this was what the communique signified. This was not conveyed to them by me as our interpretation of the communique.

Mr. WOLFF. The other way around.

Mr. McCONAUGHY. Yes.

#### CONSULTATIONS IN 1972

Mr. WOLFF. During that period, Mr. Judd was here and he testified about his role in the normalization procedure and the opening up of original negotiations. During the time that you were ambassador, since you were in a key role, a key position with the administration, did the Department discuss with you or ask you for your recommendations regarding the future relations with Taiwan, or the future of our relations with the People's Republic of China?

Mr. McCONAUGHY. No, sir. There were, of course, instructions to me as to how I should handle the presentation of the news of the communique, but I did not try to interpret or read between the lines of the communique. I tried to reassure them that there was no immediate contemplation of any interruption of our relations with them, and there wasn't, of course.

Mr. WOLFF. What I am getting to is the reverse of that. Were you consulted, or were you asked for your advice as to how we should proceed, or were you instructed?

Mr. McCONAUGHY. My advice on how we should proceed with the mainland was not asked.

Mr. WOLFF. Was your advice solicited at all as to how we should proceed with Taiwan, or were you instructed?

Mr. McCONAUGHY. It was pretty much left to me how I presented it. Of course, I could not go beyond the language of the communique, but I felt that President Nixon did intend to manifest continued concern for the security and well-being of Taiwan. I had various conversations with the President, when I was in the United States on leave, that led me to believe that.

Mr. WOLFF. At any time, did they indicate to you the nature of what finally evolved as the "one China," and the separate relations with Taiwan; was that part of the scenario, so to speak?

Mr. McCONAUGHY. My own Government?

Mr. WOLFF. Yes.

Mr. McCONAUGHY. No; that was not gone into, really, as to what direct impact, eventually, the Shanghai Communique might have on the Government of Taiwan. That was not gone into at that time.

I think the process of looking toward normalization, it was anticipated that it would be a slow process.

Mr. WOLFF. I did not mean to interrupt, but I wanted to put these things in perspective. One of the problems that we have is the question of consultation on all of these moves that have taken place, whether they were made within the confines of some small group, or within

the Department itself, which was part of the consultative mechanism that finally evolved this policy.

Mr. McCONAUGHY. Of course, the negotiations with Peking leading up to the announcement of July 1971, after Mr. Kissinger's trip to Peking, were very closely held, and I was not a party to those.

Mr. WOLFF. Were you advised that he was going there, or that he was there before the announcement?

Mr. McCONAUGHY. No, sir.

Mr. WOLFF. We have been noting a kind of a precedent for some things that have been happening of recent date where there has been a lack of notification.

Mr. McCONAUGHY. Shall I proceed, Mr. Chairman? I have just about 5 minutes more of this presentation, and then I will hold myself available for questions and discussion. It goes without saying, speak up at any moment if you want to. I have notes, here, and it does not disrupt my train of thought.

#### POLICY SHIFT IN DECEMBER 1978

I must admit to some puzzlement at the sudden policy shift when the President made his announcement on the 15th of last December. I had assumed that we would reach some sort of a compromise with Peking on the points at issue. I was, I can say without much exaggeration, stunned when I realized that we had given in on all three of the essential points which I had assumed would be at issue; namely, complete severance of official relations, the withdrawal of all military personnel, and the termination of the treaty of mutual security. This goes beyond what the Shanghai Communiqué seemed to foreshadow.

I had assumed that certainly our negotiators would obtain some concessions, on at least some of these points. I was almost incredulous when it turned out, at least according to my interpretation, we gave in completely on all three of these points. I could not see that Peking had granted any particular concessions to us.

It is true that Peking has rather grudgingly agreed to look the other way in regard to our continued supply of defensive material to Taiwan. Even there, we agreed that nothing new would be supplied while the treaty is still in effect—for the remainder of this calendar year.

While there could be additional new army sales after the treaty expired, that was not much of a concession by Peking.

Peking did not contradict our statement of concern about the security of Taiwan, but you cannot say that it is much of a concession when they just kept quiet, and did not make any commitment, while we made substantial, or complete concessions on all three of the points which they considered to be at issue.

#### U.S. REPRESENTATION ON TAIWAN

I believe we did, according to press reports, originally ask for a liaison office in Taipei, such as we had up to that time in Peking, but apparently that was dropped very quickly. It was not really pressed. I am going to come back to that later, and you will see that it is essential, in my view, that we seek to have something equivalent to a liai-



son office. It might be a consulate, as it has been suggested, but anyway, some sort of official presence short of a diplomatic mission.

I agree that it would now be hopeless to sell Peking on the idea of U.S. diplomatic representation in Taipei, but I believe that a very strong case could be made by us for a liaison office, which is official but not diplomatic.

I believe the Secretary of State has indicated that he did not really press Peking to be more specific on the nonuse of force against Taiwan. There was some surprise for me in that. Although I don't know that a Peking pledge on this point would have much tangible value, it might have had some psychological and moral value.

#### TAIWAN PLEDGE ON FORCE

Mr. WOLFF. May I interrupt again on this? Were you ever instructed to go to the Government on Taiwan and ask them for a pledge not to use force in order to reunite the mainland with Taiwan?

Mr. MCCONAUGHY. Yes; that had been a constant concern of ours for many years, even before I arrived there. My predecessors had taken that up. Of course, we did have a pledge which actually was an exchange of letters, as you probably recall, Mr. Chairman, which went along with the Mutual Defense Treaty of 1954.

In this exchange of letters attached to the treaty, there was an assurance by the Government on Taiwan that they would not use force against the mainland without our concurrence; but after that, there were a few "pinprick" raids, occasionally, along the coast, and that was the subject of discussion while I was there.

An understanding was reached with the Government, I guess it was in 1969, or about that time, that there would be no more of that without our concurrence. Of course, they knew we were not about to give our concurrence, so they terminated those, and I believe there were no more raids of any sort after that date.

#### PRIVATE CORPORATION OPPOSED

Now, a word about the difficulties of a private institution, or a private corporation as is contemplated by the administration, to carry on our relations, and the conduct of our affairs with Taiwan.

To my way of thinking, it is highly improper, undignified, and even, in a sense, not exactly straightforward to set up an ostensibly private corporation, which everybody knows is really official, to carry on our business in Taiwan. It takes an act of Congress to set it up. The claim that it is private would simply be a fiction, a transparent deception, you might almost say.

I just think that it does not accord with our dignity as a nation and with our sense of straightforwardness to play a game like this, a charade, and pretend something is the case when it is not. In the serious business of conducting our Nation's affairs, I don't think that there is any room for a game like this.

#### JAPANESE FORMULA

It is true that the Japanese have done something along the "Institute" line. I think that is considered to be a model which we might follow. But our situation is quite different from Japan's. Despite the great

importance that Taiwan has for Japan, that country does not have the tremendous involvement with Taiwan across the whole spectrum of relations that we must sustain. In addition to the greater total economic interest that we have, we have the security responsibilities. Also, I guess that the Japanese representational tradition is a little different from ours.

So the Japanese have gotten away with the unofficial agency concept pretty successfully. But it is a different matter when we, the country that in the view of the Government of Taiwan, is the one that really counts, adopts this procedure. It is particularly demeaning to Taiwan, and I think it is unsatisfactory and inappropriate for us.

#### DOUBTS EXPRESSED

I believe, Mr. Chairman, there is actually a law on our books prohibiting private citizens from acting as agents of the U.S. Government, or attempting to conduct the business of the U.S. Government. The employees of the private corporation or institute would not actually be functioning private citizens, but technically on the record they would be private citizens.

So I would assume that we would have to repeal this law prohibiting private citizens from trying to conduct official business for the U.S. Government. That is just one example of how absurd it seems to me to go through this sort of mumbo-jumbo.

I know enough about the Government on Taiwan to be sure that it will not be happy about being required to go through the same "private agency" pretense. It may be wondered whether "private agencies" of the sort contemplated, with just a few officers, will have all the expertise that will be needed to handle the whole complex of United States-Taiwan relations.

Let us take, as example, the servicing and handling of the colossal U.S. Export-Import Bank commitment in Taiwan, loans and loan guarantees that amount to, I suppose, close to \$2 billion; the monitoring of the peaceful uses of atomic energy there, with seven or eight giant nuclear powerplants scheduled to go up, one of which is already completed, and two others, well underway; the tremendous flow of students and businessmen from Taiwan to our country, and of American tourists to Taiwan. This is quite apart from the enormous private industrial investment we have through American branch factories operating there, and the tremendous bilateral trade between Taiwan and the United States. This two-way trade with Taiwan, exceeds by far our two-way trade with the entire mainland of China.

It is a big order for a small group of ostensibly private citizens to handle. Of course, there might be arrangements for officials of our Government to go there on loan as advisers or temporary consultants to our "private" institution or its Taiwan counterpart. I don't know whether the Chinese Communists would frown on that or not. Should we have to worry whether the Chinese Communists like our way of conducting relations with Taiwan? I am afraid that the way things are shaping up, the administration would worry.

There is simply no precedent under our laws and traditions for private U.S. citizens to carry on our diplomatic, consular, defense, economic, technical, scientific, and cultural relations with another country.



Then there would also be all kinds of problems for the Taiwan Government. They would have to have "private" citizens here, not only to conduct their reciprocal part of the affairs that we are talking about, but also to look out for the very large community of Chinese citizens in this country who owe allegiance to the Government on Taiwan.

Naturally, the Taiwan Government wants to keep in touch with this community and retain its loyalty. It wants to counteract the efforts to subvert this Chinese community that can be anticipated from the Chinese Communists as they begin to get consular offices spread over our country. Can the Taiwan Government do that through supposed "private citizens"? The Taiwan representatives will need the right to work with, and extend protection to the Taiwan Chinese citizens in this country. It might be difficult to avoid conflicts between the Taiwan unofficial and the Peking official representatives in the contest for the allegiance of Chinese nationals in the United States and our proposed policy would give the advantage to Peking.

I can envisage just a whole morass of problems developing out of the proposed private citizen approach if it is allowed to go through.

#### TAIWAN UNIQUE

There is something that I might say on the unique status of Taiwan. There is really no status comparable to it anywhere else in the world, that I know of, but in the interest of time, I think I will pass that over now. It may be that you, Mr. Chairman, or one of your colleagues may want to raise that with me at a later time.

Now my conclusion—there are just a few points, four points that I would like to make in conclusion—summation and conclusion. The first point, we have now recognized the "reality," it might be said, on the mainland. The proponents of recognition have been saying for many years: "We can't blind ourselves to the reality of the Government on the mainland." We have accepted and recognized that reality. At the same time, should we be required to deny the reality on Taiwan? That has been and is a real government, too. Actually in terms of total world impact, when you take into account their tremendous trade and their shipping, their role in air transportation and in world telecommunications with two satellite receiving stations on Taiwan, in view of all that, can we deny that they are a governmental entity. If they are a government, they are certainly entitled to send and receive official representatives. I do not say "diplomatic," but "officials," short of diplomatic.

#### CONGRESSIONAL ROLE

Next I would like to make the point that while the President was certainly within his constitutional prerogatives in carrying out the negotiations with Peking, there is one provision in the agreement reached which has to be considered conditional because it requires congressional action. That is the one whereby we agree that there will be no official representation between us and the Government on Taiwan.

It was certainly known at the time that the agreement was signed that congressional action was required to implement this provision. Since congressional action has not yet been taken, it seems to me that we have to say that this matter is still in suspense. The Congress has not yet agreed to this undertaking. So, it seems to me that up to now

that provision has not been consummated and there may yet be time to seek an amendment of the ban on official representation.

Third, I recognize, and I believe you would agree with me, Mr. Chairman, that we certainly need executive and legislative branch coordination here. There is a role for the executive branch, and there is a role for the legislative branch. They need to act in concert on this issue. If there should be an impasse, or if they work at cross-purposes, it could result in a very awkward and difficult situation.

I believe that when we get an agreed foreign policy, a national consensus, there ought to be nonpartisan support of the policy. Politics, in a sense, stops at the water's edge. I feel that the President certainly deserves to have his arm upheld, especially at this time, when there are so many almost immeasurable problems in foreign policy facing him.

I feel that we must support in general the new policy, but try to induce the administration to seek a better representational arrangement than the proposed one, which I consider preposterous. But if it turns out that if modification cannot be achieved, then I would say that we must, reluctantly go along with the proposed arrangement. An imperfect arrangement for conducting our relations with Taiwan is better than no arrangement at all.

#### TAIWAN'S IDENTITY

My fourth and final point is that we should resist efforts by the Peking Government to dictate our Taiwan policy. Taiwan is a separate entity. I don't say that it is a separate sovereign Chinese Government, but it is a very special case. Peking has recognized that fact by making these offers of autonomy and the right for Taiwan to keep their own armed force. Peking recognizes that it is not comparable to an ordinary province, one of the contiguous provinces of China.

Taiwan has a history of separate identity from the mainland. I will not call it a separate sovereignty, but a separate entity. I believe myself that it is the intention of the Peking Government, gradually, to try to isolate Taiwan. Any isolation would make it more difficult for Taiwan to maintain itself. Any international discrimination, for instance, against Taiwan's foreign trade or maritime and aviation traffic would undermine Taiwan's ability to support its population.

There could be many ways whereby Peking might bring pressure to bear on Taiwan if it has no recognized governmental status. It is chiefly our view that counts in this matter. If we don't consider that Taiwan has a Government, then the Taiwan people and their Government are put in a very vulnerable position.

So I would like to see us adopt the principle that we are not going to allow the Peking Government to dictate our policy as to the status of Taiwan.

Thank you, Mr. Chairman.

Mr. WOLFF. Thank you, Ambassador McConaughy, for a very comprehensive statement. Certainly, the background that you have had is a very valuable one for this committee.

#### TAIWAN'S SELF-DEFENSE ROLE

I would like to ask you a few questions. First of all, you indicated that we had not extracted concessions from the People's Republic of



China. I might offer up the fact that statements that have been recently made indicate the People's Republic of China is prepared to grant the Taiwanese permission to maintain their own defense forces on Taiwan. This is No. 1.

No. 2.: The point that you referred to, the sale of defensive arms was the second point. The third is that they consider the "Japanese formula" to be a major concession. They consider these to be concessions. They consider that they have made certain concessions.

My question is this: Do we need—you have been privy to the information insofar as the defense capability of Taiwan—do we need our military forces on Taiwan for its defense?

Mr. McCONAUGHY. No, sir, I am not sure that we do. The fact is that we have not had combat forces there, as you know. Our forces there have been Air Force elements in logistic support of our operations in Southeast Asia, and Taiwan Defense Command and Military Assistance Advisory staff. Charged respectively with defense planning and training.

I think the Government there has very impressive defensive resources at its disposal. I think that it is unlikely that we will see a Chinese Communist attack. They want to absorb, or in their words, reunify the island by means other than force. They want to take it over intact. Of course, it would be a tremendous asset to them if it is taken over intact, and viable.

So I think the main danger is international isolation and economic pressures on the productivity and foreign trade of Taiwan, brought about and induced by tactics of the Government in Peking. That is my primary apprehension.

#### MUTUAL DEFENSE TREATY

Mr. WOLFF. We come to another of the points in question, the question of the Mutual Defense Treaty. According to the War Powers Act, the President has the discretion to act in case the security interests of the United States are threatened. Congress has the authority to come to the assistance of any entity that it wants to in the event that it feels that the security interests or the basic interests of the United States are in some fashion threatened.

So you see, the President, even without this Mutual Defense Treaty, would have the opportunity, if he so desired, to meet these military considerations, regardless of whether there was a Mutual Defense Treaty or not. We do not have one with Israel, yet we have come to their assistance. That is point No. 2.

The third point that we have conceded concerns derecognition. Thus the points are the military forces, the question of the abrogation of the defense treaty, and the third point of derecognition.

#### KENNEDY-WOLFF

Now there are those of us in the Congress, about 100 of us so far, who are attempting to take the omnibus bill that was presented by the administration, and amend that omnibus bill by a joint resolution which attempts to solve some of the problems of the defense requirements, without abrogating the agreement of normalization with the People's Republic of China that has been made by the President.

I don't know whether or not you have seen that resolution.

Mr. McCONAUGHY. I have not seen the text.

Mr. WOLFF. I might read you some points in this, and see whether that satisfies some of the requirements which you have:

Regarding the peace, prosperity, and welfare of the people on Taiwan, the Pescadores, and for other purposes.

Whereas the Government of the United States and the People's Republic of China on January 1, 1979, recognized each other and established diplomatic relations;

Whereas the President on January 1, 1979, terminated diplomatic relations with the Republic of China and gave notice that on December 31, 1979, the United States will terminate the Mutual Defense Treaty between the United States of America and the Republic of China, pursuant to article X thereof;

Whereas the American people have had and desire to continue to have extensive, close, and friendly relations with the people on Taiwan and the Pescadores (hereinafter "Taiwan");

Whereas the United States has a continuing interest in the peaceful resolution of the Taiwan issue and expects that the Taiwan issue will be settled peacefully by the Chinese themselves;

Whereas in pursuance of its interests in the stability and peace of the area, the United States will continue to provide Taiwan with arms of a defensive character; and

Whereas the United States recognizes that an armed attack directed against Taiwan would represent a danger to the stability and peace of the area: Now, therefore, be it

*Resolved by the Senate and House of Representatives of the United States in Congress assembled,*

SECTION 1. The President is directed to inform the Congress promptly of any danger to the interests, concerns and expectations of the United States in the peace, prosperity, and welfare of Taiwan.

SECTION 2. The Congress finds and declares that it is the policy of the United States to act in accordance with constitutional processes and procedures established by law to meet any danger described under section 1, and otherwise to safeguard the interests, concerns, and expectations of the United States.

How much further beyond that we can go is very problematical, because we are talking about the trade, we are talking about the military, we are talking about the security, and we are talking about the interests of the United States and the people of Taiwan.

#### CONGRESSIONAL SUPPORT

The United States has never taken the position, as it should not have, for any particular regime in the area. As cosponsors of this legislation we have the leadership of the Democratic side of the House. The fact is that we have 100 Members, Democrats and Republicans, of various spectrums—conservatives, liberals, moderates—all banded together in order to find some way to fill the vacuum of this omnibus bill which does not address itself at all to the security of Taiwan, or to the interests of the United States.

I am just wondering on this basis—I don't ask you to pass judgment on this one, but I am just wondering if for the next few days—we have got to mark this bill, by the way, this omnibus bill, and we will start markup on it next Wednesday—if you could perhaps give us your comments, for the record.

#### KENNEDY-WOLFF ENCOURAGED

Mr. McCONAUGHY. I will be glad to do that, Mr. Chairman. Certainly this goes a long way to give the type of reassurances that I



think are very useful on the security side. The one thing that is not here, that I think is so important is this matter of our public acceptance of the obvious fact that there is a government on Taiwan.

It is almost incredible, but the way things are set up, we are practically in the position of implying that there is no government there. The insistence on private citizens as representatives carries that implication.

Mr. WOLFF. In the Omnibus bill, we do regard all of the treaties that are in effect with the exception of the Mutual Defense Treaty, which is in notification of abrogation in 1 year, and do indicate at that point that all of these treaties will remain in force—treaties and executive agreements—will remain in force with the people on Taiwan.

The people on Taiwan have tried to get a definition of what the administration means "by the people on Taiwan." They could be people from Mars, as far as the information that we have been able to get.

Mr. McCONAUGHY. "The people on Taiwan" does not mean anything. The agreement has got to be with their government. The Government on Taiwan is very effective. They are not a people living in anarchy. It is absurd for us to pretend just at the behest of the Chinese Communists, that there is a nongovernmental situation on Taiwan, so we can only exchange private citizens representatives.

#### FUTURE CONCERNS

Mr. WOLFF. There is another factor there which I think is important. I think that we are looking the other way, and the Chinese are looking the other way, in order to reach some sort of accommodation. I think that this is important, because if only we are looking the other way, and they are not, then, I think, it obviously could not work.

My question for the future is, how long are we both going to look the other way? That, I think, is the most serious part of this entire question.

Mr. McCONAUGHY. That is right.

Mr. WOLFF. If there is a change of regime, for example, we have put into concrete some very important factors. If there is a change of regime, will they follow through on the same attitude as has been displayed, a very progressive attitude that has been displayed by the present regime in the People's Republic of China?

Mr. McCONAUGHY. I think that we have to look at the fact, though, that Vice Premier Deng did refrain from giving any unqualified assurance when he was in this country, or at any other time, as far as I know, that they would renounce the use of force, or the threat of the use of force.

He is reserving this as something, at least in principle, which might be important. I don't believe that he intends to use it, but I believe he thinks that just the threat of the use of force can be a useful sort of "Sword of Damocles" to hold over Taiwan.

#### U.S. FORCE NOT RULED OUT

Mr. WOLFF. Similarly, we have not renounced the use of force in the event that they resort to the use of force. I think the President indicated that just the other day.

Mr. McCONAUGHY. That is right.

Mr. WOLFF. Where we have clout in this, you might find that it is a step forward. But I am concerned that there are a lot of potholes, and there are a lot of very serious areas where we might trip and fall. It would be a very tragic situation if that did occur.

I think that we have to be concerned with other elements that are impacting upon that area of the world, the Soviet influence in that part of the world, which it is trying to build up. The fact that we should have peace, not at any price, but peace is a very important consideration for all us because very little progress has been made if there is any type of war or disruption of peace.

Mr. McCONAUGHY. You are right.

Mr. WOLFF. I want to thank you very much, Ambassador McConaughy, for coming before us. I know that in this weather, and everything else, it has been an imposition upon you. But we really appreciate your being able to give the benefit of your experience.

Mr. McCONAUGHY. Thank you very much, Mr. Chairman.

Mr. WOLFF. At this point in the record, the submission so kindly prepared for us by Admiral Gayler will appear. The subcommittee wants to extend its special thanks to the admiral, and our apologies that the snow has forced us to curtail today's hearing at this point.

For the record, without objection, we also are pleased to submit a paper on "The Legal Status of Taiwan After Derecognition and Some Comments on the Proposed Legislation," prepared at our request by Prof. Victor Li of Stanford. Professor Li, who was of great assistance to the subcommittee during our normalization hearings last year, continues to earn our gratitude for his thoughtfulness.

Finally, and by no means least, Senator Goldwater has asked that we include in our record his views on the President's actions of December 15. Without objection, we will be pleased to do so when they come in.

The subcommittee stands adjourned until further notice.

[The material referred to follows:]

STATEMENT OF ADM. NOEL GAYLER, FORMER COMMANDER-IN-CHIEF,  
PACIFIC, CINCPAC

Mr. Chairman, I'm glad to present this today, because I believe that solutions to our apparent dilemma in China policy are both possible and necessary.

Possible, because we can, if we will, develop a policy that will permit realistic and friendly relations with mainland China and at the same time avoid any implication that we are throwing Taiwan to the wolves, or that we are ganging up with others in Asia against the USSR.

Necessary, because we must at the same time reduce tensions to enhance the peace, improve the strategic balance (what the Russians call "the correlation of forces"), and maintain our faith and honor as an ally.

I believe the normalization of relations with China is necessary and realistic. The unprecedented and open-ended military buildup of the USSR continues. Their intentions are uncertain: while they may not want war, they certainly want to pick up all the marbles they can under the shield of military dominance. China, if not an ally, is certainly a makeweight on the other side of the scale. And it is of course only realistic to recognize the long-continued effective control of Peking over the whole of mainland China.

At the same time, it is most important that we not give the impression we are trying to create, or participate in, an Asian coalition hostile to the USSR. The Russians are singularly lacking in insight. They do not perceive that it is their own military buildup, support of international aggression, and declaratory support of "wars of national liberation" that create the thought of a coalition against them. Their reaction to the idea would be calculated to give us the greatest possible pain, and might even be violent. And we've given a lot of hostages to fortune. We are a deficit nation in natural resources, not only in oil, and our Allies and



friends even more so. We've neglected our Pacific Fleet and Pacific Air Forces, and the security of our vital sea and air lanes in the Pacific and Indian Oceans—the whole of the Asian littoral, is by no means assured. We're in no position to pick a quarrel, even if that were a good idea, which is isn't.

The proper place for the United States in the power triangle is just where we are—on better terms with each of the two great adversaries than they are with each other. And here, I believe, Japan, our most important Ally, would be glad to join us.

So far, so good. But our major dilemma is our moral commitment to Taiwan, a faithful Ally for 32 years. It is essential both to our moral position and to our perceived strength and will that we not renege on that commitment. How can we reconcile these imperatives, in the light of the insistent position of the PRC that the fate of Taiwan is an internal Chinese question?

It seems to me that the answer lies in our taking all necessary measures in support of Taiwan to insure the continued security of that island. At the same time, while not involving ourselves in the process, we should encourage in every way a peaceful political evolution.

What is needed for continued security?

Continued political viability. In the absence of formal political relationships with most of the world, Taiwan should have workable institutions and links necessary to her continued functioning.

Continued economic strength. We should help to maintain in fact the economic and trading relationships that have facilitated the economic success of Taiwan.

Military security. There seems to be no reason to believe that Peking contemplates military action against Taiwan, and there are many persuasive reasons why it would not seem to be in her interest to do so. Yet the scene changes, and so do the players. It's possible to visualize circumstances in which the PRC might have other ideas:

An important Russian presence in Taiwan.

A move toward permanent independence from China, under the leadership of the Taiwanese majority.

A continued refusal to negotiate political arrangements acknowledging mainland sovereignty.

The security strategy of Taiwan would therefore seem to be to discourage military solutions by making the price as high as possible. It would seem they should borrow a leaf from Sweden and Switzerland, who have long lived in war and peace next door to powerful and overbearing neighbors, and yet maintained their independence. They should make themselves as indigestible as possible, so no one will be tempted.

So we come to the military security of Taiwan. There seem to be four military options open to the PRC:

They could attempt to invade and conquer. I think this is beyond their present military capability, and that it would take a number of years of military buildup before it was feasible.

They could punish Taiwan from the air. This would entail tremendous loss before the defenses were finally submerged, and would in any case be a pointless operation.

They could blockade or threaten blockade. This is a far more serious problem. It's feasible now, with present PRC naval and air forces, including submarines. It could be given some color of legitimacy in international law. It would not entail the full political liabilities of invasion or air attack.

They could take some lesser military action, for example the seizure of islands, designed to humiliate the ROC and demonstrate its weakness. This seems perhaps the likeliest military course of all, given the Maoist legacy of politico-military action.

Let me say again that I am not predicting any of these actions, nor do I think them likely. I believe that it would be wise for Taiwan to further insure against them by raising the price.

What should Taiwan do to enhance military security? This is certainly not a time for gratuitous advice, and if any of my friends should read these words, I hope they will forgive me. But from a military point of view, these actions seem necessary:

Strengthen the defenses of their airfields and secure their aircraft. Harden and dig in.

Provide sufficient overwater attack air capability to ensure against an effective close blockade by surface forces, or demonstrative seizure of ROC islands.

Provide enough air and undersea surveillance and air anti-submarine capability to keep submarines honest—e.g. to prevent their operating on the surface.

None of these measures are, in my judgement, provocative, nor do they go beyond the limits of tacit PRC acceptance. They involve some shift from ROC land to sea and air forces, plus some work with pick and shovel, but they do not necessarily imply an increase in the ROC defense budget. So long as Taiwan is economically prosperous, their defense should be affordable.

We can and should help by making technology, aircraft and weapons available on reasonable terms on the basis of need.

To summarize, it's my belief that:

Recognition of the PRC is right and necessary.

We should stay equidistant from China and the U.S.S.R.

The security of Taiwan is feasible, with our political, economic and military help to make the island indigestible.

These measures will be sufficient to maintain our commitment and credibility as an ally.

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"THE LEGAL STATUS OF TAIWAN AFTER DERECOGNITION AND SOME COMMENTS ON THE PROPOSED LEGISLATION," STATEMENT OF VICTOR H. LI, SHELTON PROFESSOR OF INTERNATIONAL LEGAL STUDIES, STANFORD LAW SCHOOL

I am delighted that normalization of relations with the People's Republic of China has finally taken place. But normalization still leaves many political and legal problems to be resolved, including the status of Taiwan.

After January 1, 1979, we know what Taiwan is not: it is not the *de jure* government of the state of China. Much less clear, however, is the question of what Taiwan is.

We also know that United States-Republic of China (ROC) treaties do not automatically lapse upon withdrawal of recognition. The Mutual Defense Treaty continues in effect for one more year. In a December 30, 1978 memorandum for all departments and agencies, President Carter declared:

"Existing international agreements and arrangements in force between the United States and Taiwan shall continue in force and shall be performed and enforced by departments and their agencies beginning January 1, 1979, in accordance with their terms."<sup>1</sup>

But the United States has not explained the legal rationale for preserving treaties and maintaining commercial, cultural, and other relations with an unrecognized entity.

#### I. TWO POSSIBLE CHOICES

##### 1. Successor government

One possible rationale is that the United States has treaty and other relations with the state of China. Prior to January 1, that state was represented by the ROC government. After the switch of recognition, the United States regards the People's Republic of China (PRC) as the successor government to the ROC. As such, the PRC assumes the rights and obligations of its predecessor.

The successor government theory is well known. For example, in 1971, the PRC was recognized by the United Nations as the only legitimate representative of China, and took over the seat belonging to that state.

Applying the above theory to the present situation, the PRC has succeeded to the Mutual Defense Treaty and other agreements with the United States. These treaties remain in force because the PRC has agreed, in an implied manner, that they should continue to serve as the basis of American relations with the Chinese territory of Taiwan.

In addition, since the PRC is the government of all of China including Taiwan, the United States can have no direct relations with the authorities on Taiwan, unless the PRC consents. Taiwan could have no capacity to conduct foreign affairs, except again insofar as the PRC consents, even if only in an implied manner.

##### 2. *De facto* entity with international personality

A second possible description of the legal status of Taiwan after withdrawal of recognition is that it is a "*de facto* entity with international personality."

<sup>1</sup> "Memorandum on Relations with the People of Taiwan," Federal Register, vol. 44, no. 3, p. 1075 (Jan. 4, 1979).



That is, while no longer regarded by the United States as a *de jure* government or state, nevertheless Taiwan continues to control a population and territory and to carry out the usual functions of government. Sec. 4 of the Restatement, Second, Foreign Relations Law of the United States (hereinafter Restatement) provides:

"Except as otherwise indicated, 'state' as used in the Restatement of this Subject means an entity that has a defined territory and population under the control of a government and that engages in foreign relations."

Similarly, the Convention on Rights and Duties of States, 49 Stat. 3097, T.S. 881 (1933) says:

"Art. 1. The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states."

In other words, whether Taiwan is regarded as a "state" or juridical person in international law depends on whether it carries out the usual functions of a state, and not whether it is recognized *de jure* by other states.

If Taiwan is a *de facto* entity with international personality, it may carry out the full range of foreign relations, including entering into international agreements and sending and receiving of official missions. With respect to pre-existing treaties and agreements, international law does not require that treaties entered into with a once recognized government, the terms of which are limited to the territory actually controlled by that government, must lapse after that government loses *de jure* recognition while still exerting *de facto* control.<sup>2</sup> In such an unprecedented situation, the United States could make a political decision to maintain these treaties on the ground that it may continue to deal with the authorities in actual control of Taiwan.

## II. THE U.S. POSITION

The PRC obviously views the switch of recognition as a successor government situation. The position of the United States is not clear. In the Joint Communiqué of December 15, 1978, the United States "acknowledges the Chinese position that there is but one China and Taiwan is part of China," and "recognizes the People's Republic of China as the sole legal Government of China. Within this context, the people of the United States will maintain cultural, commercial, and other unofficial relations with the people of Taiwan."

One possible interpretation of these statements is that the PRC is the successor government to the ROC: there is one state of China which includes Taiwan, and the PRC is the sole legal government of this state. Moreover, since the United States can deal with Taiwan only "within this context," the United States acknowledges the PRC's ultimate legal authority over Taiwan, including the right to approve future U.S.-Taiwan relations.

A second interpretation is the acknowledgement of the Chinese position is not tantamount to agreeing with it.<sup>3</sup> Thus the status of Taiwan remains "undetermined." Moreover, the United States also has said that, "whenever any law, regulation, or order of the United States refers to a foreign country, nation, state, government, or similar entity, departments and agencies shall construe those terms and apply those laws, regulations, or orders to include Taiwan."<sup>4</sup>

This statement might be read as an indication that Taiwan is a *de facto* entity having the attributes of a state or government.

In selecting between the successor government theory and the *de facto* entity theory, I believe that the former is not workable and does not serve American

<sup>2</sup> For a more detailed explanation of this position, see Victor H. Li and John W. Lewis, "Resolving the China Dilemma: Advancing Normalization, Preserving Security," *International Security*, vol. 2, no. 1, p. 11 (Summer 1977); statement of Victor H. Li in Subcommittee on Asian and Pacific Affairs of the Subcommittee on International Relations, House of Representatives, "Normalization of Relations with the People's Republic of China: Practical Implications" (1977), p. 87.

<sup>3</sup> There is a potentially serious linguistic discrepancy between the English and Chinese texts. The Chinese text uses *ch'eng-jen* for "acknowledges." In the context, the Chinese term carries a strong connotation of acceptance or agreement. Moreover, the Shanghai Communiqué states: "The United States acknowledges that Chinese on both sides of the Strait agree that there is but one China and Taiwan is part of China. We do not challenge this position." The Chinese text uses a correct equivalent, *jen-shih*, for acknowledges. Reading the Chinese texts of the two communiqués together, the United States has increased the degree of its acquiescence in the Chinese position from *jen-shih* (acknowledges or takes note) to *ch'eng-jen* (recognizes or accepts).

<sup>4</sup> "Memorandum on Relations with the People of Taiwan."

interests. First, the need to obtain the PRC's consent, even if only implied, for continued dealings with Taiwan constantly places the United States on the defensive. Serious difficulties would arise if, at a later time, the PRC objects to some aspect of U.S.-Taiwan relations.

Secondly, the successor government theory leads to problems in areas other than treaties or official relations. For example, the ROC has deposited in American banks over \$4 billion of its foreign exchange reserves. If the PRC is the successor government, it could assert that this money belongs to the "state of China" and should be handed over to the proper representative of that state, the PRC. The transfer of such a vast sum would undercut any policy to ensure that the people of Taiwan "face a peaceful and prosperous future."

Finally, one of the reasons for moving ahead with normalization is to bring American policy into accord with reality, a laudable goal. Structuring our dealings with Taiwan as though it were a subordinate unit of the PRC would be a departure from reality.

I believe that the United States should make clear that it regards Taiwan as a *de facto* entity with international personality. Such a stand accurately reflects reality: derecognition has not affected the manner in which the authorities and 17 million inhabitants of Taiwan conduct their affairs. The United States simply is acknowledging the fact that Taiwan continues to manage its affairs in an autonomous manner.

I should note that the above suggestion does not violate the principle of one China. The *de facto* entity concept deals with present political realities, and does not require or preclude eventual reunification or any other outcome. Indeed, Vice-Premier Teng's recent indication that Taiwan may retain its own political and economic systems as well as maintain separate armed forces acknowledges the same realities.

The United States may derive some short term benefits from refusing to clarify the legal rationale for continued dealings with Taiwan. After all, explicitly calling it a *de facto* entity would aggravate the PRC, while adopting the successor government theory would damage Taiwan. This policy of intentional ambiguity may be difficult to maintain for an indeterminate time. In the years to come I suspect that we will see many situations where the PRC would attempt to assert its position as the successor. Each instance would set a precedent for future dealings.

One of the first possible cases is likely to involve the ownership of the former ROC embassy at Twin Oaks.<sup>5</sup> The PRC may consider the obtaining of the state of China's diplomatic property an important political and symbolic act. If the Executive or the courts transfer the property to the PRC as the successor government, then other ROC assets, such as the several billion dollars in bank deposits may also be jeopardized. Allowing the PRC to succeed only to property acquired before 1949 removes many of the difficulties, but still leaves unresolved problems such as the \$550 million contribution made to the International Monetary Fund by the ROC in 1947.

### III. ATTRIBUTES OF A *DE FACTO* ENTITY WITH INTERNATIONAL PERSONALITY

This section discusses the capabilities and disabilities of a *de facto* entity, comparing them with the attributes of a *de jure* recognized state. It should be pointed out at the outset that the *de facto* entity concept is not new or unfamiliar. Prior to January 1, 1979, the United States dealt with the PRC on exactly such a basis. Although we did not extend *de jure* recognition, official missions were exchanged, agreements were reached, American presidents visited the PRC, and a considerable amount of trade and travel was carried out. No one seriously questioned the capacity of the PRC to engage in such relations.

#### 1. *International law perspective*

A *de facto* entity has the capacity to have treaty and other foreign relations, even with countries not extending it *de jure* recognition. Sec. 107 of the Restatement provides:

"An entity not recognized as a state but meeting the requirements for recognition [of controlling a territory and population and engaging in foreign affairs], or an entity recognized as a state whose regime is not recognized as its govern-

<sup>5</sup> The ROC attempted to "sell" the property to a group of persons prior to January 1, reportedly for a token amount. This transaction would not appear to be legally effective.



ment, has the rights of a state under international law in relations to a non-recognizing state, although it can be precluded from exercising such a right if (a) the right is of such a nature that it can only be exercised by the government of a state, and (b) the non-recognizing state refuses to treat the purported exercise of the right as action taken by the government of the other state."<sup>6</sup> In recent years, the United States has entered into agreements regarding a wide variety of subjects with *de facto* entities such as the Democratic People's Republic of Vietnam, the German Democratic Republic, and the PRC.

The American decision to conduct future relations with Taiwan through a quasi-governmental corporation rather than through formal official channels does not affect the status of Taiwan in international law. This decision reflects political factors in U.S.-PRC-Taiwan relations, and is not the result of some inherent disability of *de facto* entities.

## 2. Existing legislation

There are very few provisions in American legislation which provide that *de jure* and *de facto* entities should be treated differently.<sup>7</sup> In general, the legislative approach has been to treat them similarly, unless there is a specific provision to the contrary. Some semantic confusion exists, since terms such as "foreign country" or "foreign government" are often used in an undefined and even inconsistent manner. President Carter's memorandum of December 30, cited earlier, and the proposed legislation resolve this confusion by making all such terms applicable to Taiwan.

The proposed legislation resolves most the legal problems which may arise after withdrawal of recognition. However, two potential difficulties remain. A number of statutes place various restrictions on dealings with "Communist countries."

For example, the Export-Import Bank may not take part in transactions involving sales to or products from "a Communist country," unless the President determines that the transaction is in the national interest.<sup>8</sup> The Foreign Assistance Act bars assistance to countries that are "dominated or controlled by the international Communist movement," as well as to "any Communist country" unless the President finds that such assistance is "vital to the security of the United States."<sup>9</sup> Similarly, Communist countries are not eligible for purchase of surplus agricultural products on credit or for foreign currencies,<sup>10</sup> cannot be designated a beneficiary developing country for purposes of the generalized system of preferences,<sup>11</sup> and are charged a higher tariff rate.<sup>12</sup>

As discussed earlier, the December 15 Communiqué states that the United States "acknowledges the Chinese position that there is but one China and Taiwan is part of China." This sentence might be read to mean that Taiwan is part of a Communist country, the PRC. Such an interpretation appears to be contrary to the President's position, but neither earlier official statements nor the proposed legislation directly addresses this problem.

In addition, other statutory programs are applicable only to "friendly countries." These include military sales and assistance,<sup>13</sup> the Overseas Private Investment Corporation,<sup>14</sup> sale of American agricultural surplus on credit terms or for foreign currency by the Commodity Credit Corporation,<sup>15</sup> loans to small farmers of predominately rural countries,<sup>16</sup> and expenditures of funds received pursuant

<sup>6</sup> See also sec. 108 of the "Restatement" which discusses the obligations of an unrecognized entity. Similarly, art. 6 of the Vienna Convention on the Law of Treaties says: "Every state possesses capacity to conclude treaties." However, the Convention does not define "state."

<sup>7</sup> For a detailed discussion of the legal effects on U.S.-Taiwan relations if the United States withdraws *de jure* recognition, although the Taiwan authorities continue to maintain *de facto* control, see Victor H. Li, "De-recognizing Taiwan: The Legal Problems" (Carnegie Endowment for International Peace, 1977).

<sup>8</sup> 12 U.S.C. 635(b) (2).

<sup>9</sup> 22 U.S.C. 2370(b), (f). For purposes of sec. (f), the PRC is specifically listed as a "Communist country."

<sup>10</sup> 7 U.S.C. 1703(d) excludes Communist countries from being "friendly," but does not define which non Communist countries are friendly.

<sup>11</sup> 19 U.S.C. 2462(b).

<sup>12</sup> 19 U.S.C. 1202(e).

<sup>13</sup> 22 U.S.C. 2311, 2751.

<sup>14</sup> 22 U.S.C. 2191.

<sup>15</sup> 7 U.S.C. 1701. Up until the mid-1960s, Taiwan had received considerable economic aid under this and related programs. Such aid has since ceased.

<sup>16</sup> 22 U.S.C. 2175.

to the Agricultural Trade Development and Assistance Act of 1954.<sup>17</sup> Interestingly, nowhere in these statutes is the term "friendly" defined.

The proposed legislation does not explicitly affirm Taiwan's "friendly" status, although testimony by Administration officials makes clear that the intention of the legislation is to leave unchanged Taiwan's eligibility for the above-mentioned programs.

### 3. Judicially developed rules

Even without the proposed legislation, judicially developed rules impose few serious disabilities on *de facto* entities. They are entitled to claim sovereign immunity to the same extent as *de jure* recognized states. In *Wulfson v. Russian Socialist Federated Soviet Republic*, 23 N.Y. 372, 138 N.E. 24 (1923) the R.S.F.S.R. was "an existing government sovereign within its own territory," but unrecognized by the United States. Immunity was granted on the ground that a foreign sovereign, even if unrecognized, cannot be sued in an American court without his consent. The Foreign Sovereign Immunities Act of 1976, 90 Stat. 2891, makes no explicit mention of unrecognized entities, but instead refers generally to "foreign states." The absence of a specific provision implies that pre-existing rules established by case law remain valid. Moreover, President Carter's directive of December 30 and the proposed legislation directing that laws regarding "foreign states" should apply to Taiwan also would support the granting of immunity.

The act of state doctrine provides:

"Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory. *Underhill v. Hernandez*, 168 U.S. 250, 18 S.Ct. 83 (1897)."

In *Salminoff & Co. v. Standard Oil Co. of New York*, 262 N.Y. 220 186 N.E. 679 (1933) (refusal to examine the validity of a law confiscating property located in the Soviet Union), the court applied this doctrine to acts of the Soviet government, which was unrecognized but in actual control.

The "constitutional underpinning" for the act of state doctrine is the separation of powers. The Judiciary is reluctant to interfere with the conduct of foreign affairs by the Executive. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 84 S.Ct. 923 (1964). Applying this rationale to the politically delicate situation in United States-PRC-Taiwan relations, courts should be especially wary of making pronouncements about the validity or invalidity of Taiwanese governmental actions. The act of state doctrine should be applied, leaving such determinations to the Executive.

The only disability imposed by the courts on *de facto* entities is that they may not have standing to bring suit in an American court. In *Russian Socialist Federated Soviet Republic v. Cibrario*, 25 N.Y. 255, 139 N.E. 259 (1923), the court held that allowing an unrecognized government to sue would undermine the Executive decision not to extend *de jure* recognition.

Yet even this position has eroded substantially over time. A Soviet-owned corporation organized under the laws of New York was allowed to bring suit. *Antorg Trading Corp. v. United States*, 71 F.2d 324 (1934). In *Upright v. Mercury Business Machines*, 13 A.D.2d 36, 213 N.Y.S.2d 417 (1961) an American assignee of a corporation controlled by the unrecognized German Democratic Republic also was permitted to sue.

More recently, in *Federal Republic of Germany v. Ellicofon*, 358 F.Supp. 747 (E.D.N.Y. 1972), *aff'd* 478 F.2d 231, 415 U.S. 1931 (1974), *reh. denied*, 416 U.S. 952 (1974), the court did not allow the Welmer Art Collection, an East German museum which was an arm of the East German government, to bring suit. However, the court added in a footnote:

"It is unclear whether this reasoning supports a rule invariably denying standing to unrecognized governments. There may be special circumstances in which action by the President can be interpreted as creating an exception to the rule. For example, it may be argued that the act of the Executive in permitting American nationals to engage in commercial relations with unrecognized gov-

<sup>17</sup> 22 U.S.C. 1922. Other examples are: 22 U.S.C. 2102 (health research and training); 22 U.S.C. 2219 (family planning); 50 U.S.C. App. 1878(e) (loan of military vessels); 10 U.S.C. 7227, 31 U.S.C. 529(j) (routine disbursement of funds and services to military forces of a friendly country); 39 U.S.C. 407 (postal agreements).



ernments or their instrumentalities carries with it a grant to those governments or instrumentalities of standing to litigate claims arising out of those transactions in United States courts."

The same reasoning could be applied to the Taiwan situation where the United States is allowing, and indeed encouraging, continued economic, cultural, and other relations.

The *Upright* case actually deals with both the act of state doctrine and the question of standing to sue. The starting point for the court is that a "foreign government, although not recognized by the political arm of the United States government, may nevertheless have de facto existence which is juridically cognizable." The court looked to "the realities of life" and noted that an unrecognized government carries on many routine activities and that trade between the two countries is not forbidden. The legal consequences of non-recognition should be narrowly construed, unless they "can be properly related as inimical to the aims and purposes of our public and national policy." Assuring the continued prosperity of Taiwan appears to be part of the American national policy. This policy would be hindered by denying Taiwan the standing to bring suit in American courts.

Thus, judicial doctrine may be evolving to a position where unrecognized entities have standing to sue, at least in cases involving economic and cultural relations. Be that as it may, the proposed legislation removes whatever legal disabilities may exist because of a lack of recognition.

In summary, pre-existing legislation does not make major distinctions between de jure and de facto entities. Judicial practice also imposes few, if any, additional disabilities. The proposed legislation would remove the remaining obstacles to continuing all economic and cultural relations with Taiwan. However, the inclusion of an affirmation of Taiwan's "friendly" status, and a reference to the fact that Taiwan is not part of a Communist country would add to clarity.

It should be noted that the act of extending de jure recognition to the PRC, in and of itself, grants the PRC few rights and privileges. At this point, we should at least ask why we continue to use the concept of recognition, if the extending or withdrawing of recognition indeed produces few or no legal consequences of importance. Could it be that this concept, which has so shaped the United States-China relations debate, has only symbolic content? If so, perhaps we should consider whether it would be simpler and better for countries to merely "deal" with each other, without being tied to the ritual of recognition.

#### IV. A PERSPECTIVE ON TAIWAN

The formulation "de facto entity with international personality" is awkward, both semantically and substantively. But since both the PRC and Taiwan agree on the principle of one China, it is hardly appropriate for the United States, as an outsider, to propose any other position. Having to operate within this principle, the United States must use the de facto entity concept if it is to maintain economic, cultural, and other ties with Taiwan into the indefinite future.

While we may hope that Taiwan will adopt a more flexible stance in due course, the central authorities there must resolve some fundamental difficulties before any major policy shifts can occur. Despite the slogans and political speeches, I believe that few responsible people on Taiwan think that they will recover the Mainland from the Communists, or that they rule anything more than the territory of Taiwan. At the same time, over 1,500 persons in the National Assembly and Legislative Yuan hold office by virtue of elections held on the Mainland in 1947. If Taiwan forsakes its claim to the government of all of China, then the legal basis for these 1,500 persons as well as others retaining their positions also would vanish. Moreover, considerable political debate must take place, some of which may be acrimonious, to decide the form and personnel of the new government.

In making a national decision about the future of Taiwan, the views of all of the people of Taiwan should be considered. In recent years, the electoral process was beginning to bring new people representing a broad range of views into the political system. Although Taiwan is essentially a single party state, "non-party" (i.e., opposition) candidates won 38% of the popular vote in the 1977 election for local offices. In the 1978 national elections, since only 38 seats (out of 400) in the Legislative Yuan and 56 seats (out of about 1,200) in the National Assembly were up for election, the makeup of these bodies would

hardly change even if opposition candidates won a sizeable number of contests. Nevertheless, the elections provided the public an opportunity to express its views. More importantly, the winners, who would likely have included a number of opposition leaders, would have obtained legitimate standing to participate in the national debate about the future of Taiwan.

The normalization announcement was made in the middle of the Taiwan elections, and led to their indefinite suspension. Opposition candidates cannot use their campaign speeches and literature as means of voicing their opinion. Censorship and restrictions on political activity limit the means by which other persons may express dissenting views. Decision making falls back into the exclusive hands of the Nationalist party. I am concerned that the lack of a legitimate and adequate forum for national debate may lead to internal problems on Taiwan.

Finally, I want to make some comments about American moral obligations to Taiwan. Over twenty-five years ago, in a world that was very different, the United States provided massive military and other assistance to Taiwan when such assistance was sorely needed. In subsequent years, the United States contributed greatly to the remarkable growth of that island.

At some point, the original American commitments to Taiwan for military protection and economic assistance would have been fulfilled. Taiwan is not the 51st state which must be defended and assisted under any circumstances and for all time. In the course of helping to build a new society on Taiwan, however, I believe the United States has incurred new obligations to give that society an opportunity to survive and grow.

Taiwan is going through a transition from being the Republic of China representing all of China to some new and still undefined status. What that new status should be must be decided by the people on Taiwan. They must consider the offers being tendered by the PRC. If they feel the offers to be unsatisfactory, they must seek better terms or search for new solutions.

I believe the responsibility of the United States is to give the people on Taiwan a fair opportunity to make decisions about its own future. The use of the *de facto* entity approach which I have urged provides the smoothest means of making a transition. It is time for Taiwan to take its own problems in hand. If it wishes to continue the fiction of being all of China, then it has had ample notice that it must stand alone and face the consequences. If it wishes to reunify with the PRC or adopt some other status, then it must begin the process.

#### V. SOME COMMENTS ON THE ADMINISTRATION BILL

The bill submitted by the Administration removes most of the obstacles to the continuation of commercial, cultural, and other relations with Taiwan. There are, however, several gaps, as well as a number of areas where greater clarity is needed.

1. The term "people on Taiwan" is not defined anywhere in the bill. Instead, the introduction to the section by section analysis states that this term "encompasses both the authorities and the inhabitants on the islands of Taiwan and the Pescadores."

I think such a key term should be defined more clearly. First, it should appear in a more prominent place, possibly in the bill itself. Second, the definition is too vague. It does not specify what the entity "people on Taiwan" is, or which persons or authorities represent that entity. I recognize that the use of this term reflects a delicate political decision with respect to United States-PRC relations. But greater clarity would be achieved without upsetting the political decision. For example, the definition of the term might be expanded to also refer to "the entity and authorities formerly recognized *de jure* as the state and government of the Republic of China."

A related issue is that the "people on Taiwan" does not include the islands of Quemoy and Matsu. The reasons for omitting these islands probably are that they are part of the province of Fukien rather than Taiwan, and also that they were excluded from the 1954 Mutual Defense Treaty. I think it is a good idea to exclude these islands since they have virtually no economic importance, and since they are more likely to provoke conflict than act as a military deterrent. In any case, the Committee may want to examine this issue.

2. As discussed earlier in this paper, I think the United States should adopt the *de facto* entity theory and specifically reject the successor government theory. I also think that the bill or legislative history should clearly explain the theoretical and conceptual basis upon which the United States is proceeding. This



would greatly help the courts and others interpret the statute, especially in those cases (which I think may be numerous) where the statute does not directly address a specific problem. In order not to upset "the principles of normalization" the Committee could distinguish between treating Taiwan as a de facto entity for purposes of domestic U.S. law (which is the subject of the statute) and for purposes of U.S. foreign relations (which the statute takes no position on).

If the de facto entity theory is adopted, reference should be made to the fact that "the people on Taiwan" may enter into contracts, may own property, would have standing to sue, would be entitled to claim sovereign immunity to the same extent as a de jure recognized state, would be entitled to the application of the act of state doctrine, and would have its judicial judgments enforced on a reciprocal basis.

Specific reference also might be made to the foreign exchange assets now on deposit in American banks. These should continue to belong to Taiwan, whatever our stand may be on assets acquired before 1949.

3. The bill or legislative history should make specific reference to the fact that Taiwan is not considered part of a "Communist country" for purposes of domestic U.S. law. A reference to "friendly" relations also would be helpful.

4. Section 107 as presently written would have Taiwan law applied in all cases where the application of United States law depends on foreign law.

5. Sections 104-106 reflect the American policy decision to deal with Taiwan on an "unofficial" basis through corporate entities. It should be pointed out that these sections as written, as well as the theory of unofficial relations, require that the governments do not deal directly with each other, but do not preclude a government from dealing directly with the counterpart corporation. That is, while corporation-to-corporation dealings are clearly unofficial, it seems to me that corporation-to-government deals are also unofficial.

6. Does the Committee wish to make provision for the granting of diplomatic immunity or official immunity to the employees of the instrumentality to be established by Taiwan?

7. The proposed legislation lacks a clause which declares that treaties in effect on December 31, 1978 remain in effect unless specifically terminated in accordance with law. The Presidential Memorandum of December 30 contains such a statement. It is not clear as a matter of constitutional law that the President, by his own actions alone, could continue such treaties and international agreements beyond an interim period until Congress could act.

8. The Committee may wish to include provisions for Congressional oversight over the activities of the American Institute in Taiwan.

9. The bill as written contains no direct reference to sale of defensive arms to Taiwan or to other security provisions. These relations probably fall under the "other" of the "commercial, cultural, and other" relations. The bill permits arms to be sold, but contains no expression of commitment to continue such sales or to provide other security arrangements. This obviously is a key policy issue for the Committee to consider.

10. The final point is stylistic rather than substantive. This bill purports to define the future of United States-Taiwan relations, and in a very general sense, also contributes to shaping the basic future of Taiwan. The part of the bill that deals with the fundamental issues is about one page long. The other three-fourths of the bill deals with how employees can be transferred to the Institute without loss of benefits and how the Institute will be financed. It gives the reader a sense that these administrative issues are more important than the substantive issues of U.S.-Taiwan relations.

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"ANALYSIS OF PRESIDENTIAL TREATY 'TERMINATIONS' ARGUED IN STATE DEPARTMENT MEMORANDUM," STATEMENT BY HON. BARRY M. GOLDWATER, U.S. SENATOR FROM THE STATE OF ARIZONA

1. 1815: President Madison's administration exchanged correspondence with the Netherlands which allegedly established that the 1782 Treaty of Amity and Commerce had been annulled.

Analysis: There is strong historical evidence the treaty was not annulled in 1815, but remained in effect. Assuming the treaty was then annulled, the cause was the wartime destruction of one of the governments and nations, not independent Presidential power. Also, President Madison did not give notice of the treaty's termination; the foreign government first denounced the treaty.

Discussion. The Netherlands took the initiative in insisting the treaty of 1782 had expired because of the Napoleonic wars, during which the United Netherlands, with whom the treaty was made, was absorbed into the French Empire, entirely disappearing as a separate nation. After the war, it was transformed into a new nation unlike the original one. According to Samuel Crandall in his "Treaties: Their Making and Enforcement," the state thus formed "differed in name territory, and form of government from the state which had entered into the treaty of October 8, 1782, with the United States." (p. 429)

In response to a letter from the government of the new state, in 1815 Secretary of State Monroe appeared to acknowledge the Netherlands' claim that the treaty had been annulled. However, when Monroe became President, he himself repudiated this interpretation. His Secretary of State John Q. Adams argued in 1818 that the 1782 treaty was still operative. (U.S. Foreign Relations 722 et seq. (1873)) In 1831, the Supreme Court of North Carolina enforced the treaty as law in *University v. Miller*, 14 N.C. 188, 193.

At most, the incident is a precedent for termination of a treaty in agreement with the other government. Obviously, in the present case, the Republic of China wishes the 1954 treaty to remain in effect.

It is true that much later in 1873, the State Department informed the Minister of Holland that "The Treaty of 1782 is no longer binding on the parties." However, the State Department did not claim President Madison had terminated it. Rather, in a list of treaties that have been abrogated, which was prepared and published by the State Department in 1889, the Department included the Netherlands treaty under a category entitled "Treaties with Powers that have been absorbed into other nationalities."

The Department explained the termination of the treaty as follows:

The principle of public law which causes Treaties under such circumstance to be regarded as abrogated is thus stated: "The obligations of Treaties, even where some of their stipulations are in their terms perpetual, expire in case either of the contracting parties loses its existence as an independent State, or in case its internal constitution is so changed as to render the Treaty inapplicable to the new condition of things." (U.S. Treaties and Conventions 1776-1887 (1889), at 1236-1236).

2. In 1899, President McKinley gave notice to the Swiss Government of intent "to arrest the operations" of certain articles of the 1850 Convention of Friendship, Commerce and Extradition.

Analysis: The Convention was superseded by a later Act of Congress inconsistent with the earlier treaty. That statute conferred implied authority on the President.

Discussion: The State Department memo itself admits the Presidential notice "may have been necessitated by the Tariff Act of 1897." (p. 9) This admission hardly qualifies the incident as a precedent for notice where there is no accompanying legislative action.

Following enactment of the Tariff Act of 1897, the United States entered into an agreement with France under authority expressly granted by that law. The Swiss government thereupon claimed the right to enjoy the same concessions for Swiss imports as granted French products, but without making reciprocal concessions.

The United States rejected the Swiss demand because, in the words of the State Department memo: "It was contrary to U.S. general policy and to the policy of the Tariff Act to make trade concessions in the absence of a reciprocal arrangement." (p. 9) Section 3 of the Tariff Act denied the President authority to negotiate trade agreements unless "reciprocal and equivalent concessions may be secured in favor of the products and manufacturers of the United States." (30 Stat. 203).

Since Congress had passed a law clearly inconsistent with an earlier treaty, the President was compelled to enforce the later expression of legislative will. Unlike the 1899 incident, there is no subsequent statute which President Carter claims is in conflict with the Mutual Defense Treaty of 1954. To the contrary, there are numerous statutes and treaties which reinforce the purpose of that treaty.

3. In 1920, President Wilson "by agreement" terminated the 1891 Treaty of Amity, Commerce, and Navigation with the Congo.

Analysis: The treaty was terminated following Congressional action affecting that treaty. It was denounced in its entirety by the foreign government, not by notice of the United States.



**Discussion:** In the Seamen's Act of 1915, Congress ordered President Wilson to notify several countries of the termination of all articles in treaties and conventions of the United States "in conflict with this act." (38 Stat. 1184) The authority of Congress to impose this obligation on the President was upheld by the Supreme Court in *Van der Weyde v. Ocean Transport Co.*, 297 U.S. 114, 118 (1936).

In accordance with this statutory mandate, President Wilson notified Belgium of his intention to terminate Article 5 of the 1891 treaty. (The treaty was originally concluded with the independent state of the Congo, which later came under Belgian control. The change of governments further weakens the incident as a precedent for termination of the Mutual Defense Treaty since the identical governmental authorities on Taiwan with whom we made the treaty are still in effective control of the territory covered by that treaty.)

In view of the Congressionally-mandated termination of a substantive article of the treaty, Belgium replied that it wanted to terminate the entire treaty. A month later, Belgium sent a second note instructing the United States that its first note was intended as formal notice of termination of the treaty. In acknowledgement of this notice, the United States regarded the treaty as expiring one year later.

The situation is entirely different from the 1954 Mutual Defense Treaty with the Republic China. The 1891 treaty was terminated with the agreement of both parties. The Republic of China, however does not wish to terminate the 1954 treaty.

4. In 1927, President Coolidge gave notice of termination of the 1925 Convention with Mexico on the Prevention of Smuggling.

**Analysis:** The Convention was terminated during an unsettled period in relations with Mexico which caused a fundamental change in conditions essential to its continued effectiveness. The President did not inform Congress, depriving legislators of an opportunity to challenge his action.

**Discussion:** In 1927, United States relations with Mexico were unsettled because of alleged religious persecution within Mexico and confiscation of American-owned private and oil lands. In fact, President Coolidge claimed Mexico was smuggling arms and ammunition to revolutionists in Nicaragua, indicating Mexico was not a reliable treaty partner under a Convention relating to the prevention of smuggling of any articles.

During the period from March 1926, the effective date of the Convention, to March 1927, when notice of termination was given, President Coolidge enforced a strict embargo on the shipment of arms and ammunition to Mexico (see proclamation of January 7, 1924, *Foreign Relations*, 1924, vol. II, p. 428); Secretary of State Kellogg called in the Mexican Ambassador to protest mistreatment of American Catholics in Mexico, including their arrest and expulsion (*Foreign Relations*, 1927, vol. III, p. 639); the Mexican Government enacted laws for the confiscation of American-owned oil rights and agricultural lands and cancelled drilling permits previously issued to American companies, effectively suspending drilling operations (*Foreign Relations*, 1927, vol. III, pp. 180-182); Secretary of State Kellogg presented the Senate Foreign Relations Committee with documented evidence of Bolshevik plans to use Mexico as a base of operations against the United States (*Foreign Relations*, 1927, vol. I, p. 356); and in his annual address to Congress, President Coolidge criticized Mexico on the basis of "the most conclusive evidence," for supplying "arms and munitions in large quantities" to the revolutionists in Nicaragua, contrary to his requests for an embargo on such supplies (*Foreign Relations*, 1927, vol. III, p. 294).

As President Coolidge summed up the difficulties with Mexico in a speech on April 25, 1927:

"We have had claims against that country running over a long series of years, growing out of the death of many of our citizens and the loss of their property, running into hundreds of millions of dollars. A very considerable portion of these cases has been due to revolutionary activities and other forms of public violence. Public order has never been entirely complete in that country. But lately our difficulties have been increased by the enactment of laws by the Government itself, which we feel threaten the virtual confiscation of the property of our citizens, even where their holdings are under titles which have been established for scores of years." (Id. p. 216).

President Coolidge explained that these laws were contrary to an understanding our government had reached with the President of Mexico in 1923, as a result of which we had recognized the government. (Id.)

In the circumstances, there was a dramatic change for the worse in relations between the United States and Mexico from March of 1926 to March of 1927, which made the anti-smuggling convention inapplicable. Although these conditions were not described in the notice of termination due to diplomatic niceties, their existence and effect upon the Convention are undeniable. Obviously, conditions presumed to be necessary for the enforcement of the Convention, stability, public order, and proper government attitude, did not exist.

The situation in Mexico in March of 1927 fits the classic circumstances for application of the principle of "*rebus sic stantibus*." Under this doctrine, a treaty "ceases to be binding when the basic conditions upon which it was founded have essentially changed." (40 Opinions Attorneys' General 121).

However, in the case of the 1954 Mutual Defense Treaty, President Carter has not invoked "*rebus sic stantibus*." Nor could he. For an essential requirement of the doctrine is that the change in conditions must not be the result of action by the party seeking to invoke it. (1969 Vienna Convention on the Law of Treaties, Articles 61, 62; Restatement of the Law 2d, Foreign Relations Law of the U.S., at 467-470 (1965)).

Moreover, the Coolidge incident is not a valid precedent since Congress was not informed of the notice at the time and thus it went unchallenged.

5. In 1933, President Roosevelt withdrew the United States from the 1927 Convention for the Abolition of Import and Export Prohibitions and Restrictions.

Analysis: The 1927 Convention was inconsistent with and had a restrictive effect on the National Industrial Recovery Act of 1933. Therefore, the President applied the later expression of Congressional will. It also was terminated due to a fundamental change in conditions, not the result of any action by the United States.

Discussion: The official papers published in connection with the termination of the 1927 Import-Export Convention prove that the provisions of the National Industrial Recovery Act, a later statute, were instrumental in moving the President to give notice. (W. McClure, 1941, "International Executive Agreements," P. 18)

On June 19, 1933, Acting Secretary of State Phillips initiated steps towards withdrawal from the agreement by writing the Chairman of the American Delegation to the Monetary and Economic Conference, Cordell Hull, as follows: "This action by the British Government (withdrawal) and certain provisions of the new Recovery Act which authorize the President to license imports and impose embargoes make it imperative that we give immediate consideration to the question of what the United States should do in respect of this Convention." (Foreign Relations, 1933, vol. 1. P. 784). Thus, Secretary Phillips expressly identified the Recovery Act as one of the developments which made it "imperative" to consider denouncing the convention.

Hull's reply of June 23, 1933, makes it clear that the statute was unmentioned in the U.S. notice not because it was not significant to our decision, but because of diplomatic posturing. He recommended that we withdraw, but in such a way "that it not be construed as evidence of any new decision by the Government to shape its policy on domestic, rather than on international lines." Accordingly, the official notice concealed the relationship of the domestic Recovery Act to our decision as originally emphasized by Secretary Phillips. (*Id.*, pp. 784-785).

The incident stands as no more than an example of the President implementing the latest expression of Congressional intent. Since the President cannot enforce two laws which are in conflict, as the 1927 convention and 1933 statute were, he is compelled to select the one which reflects the current will of Congress. ("Presidential Amendment and Termination of Treaties: The Case of the Warsaw Convention," 34 U. Chic. L. Rev., 1967, P. 592)

The U.S. Government notice gave as the reason for withdrawal the fact that several other nations had already withdrawn, thereby defeating the original purpose and assumption for the convention. Eleven countries out of an anticipated original 19 had ceased to be bound by the convention on June 20, 1933, when the United States gave its notice, accordingly, our notice stated that while it "had been hoped that the principle embodied in the convention would be widely accepted", the "reverse" has been true.

These circumstances fit the classic example of "*rebus sic stantibus*," where a basic set of conditions or expectations were assumed to exist as the basis for carrying out the treaty, but due to changed conditions, those original purposes or expectations are no longer present. When such a fundamental change occurs, the treaty is no longer operative or binding.



The principle was recognized by Mr. Justice Davis, who wrote, in *Hooper v. United States*, that a "treaty might be construed as abrogated when material circumstances on which it rested changed." (22 Court of Claims 408 (1887)).

Thus, rather than asserting any general power to withdraw the nation from all treaties having a notice provision, President Roosevelt's 1933 notice itself clearly limits the basis of his action to the change in conditions. As the State Department memo states: "A convention on the abolition of import and export prohibitions and restrictions clearly needed widespread acceptance to be effective \* \* \*" (p. 18).

In contrast to the 1927 convention, there is no change in circumstances which prevents the 1954 Mutual Defense Treaty from being effective. The same regime with which we concluded the treaty remains in effective control of the territory of Taiwan and the Pescadores, regardless of derecognition. The territory governed by the authorities remains a critical and strategic link in the entire chain of Pacific Basin security bases from which the United States supports its national security and the security of allies with whom we have formal defense treaties.

Even if derecognition were viewed as a basic change, it cannot be invoked as a reason for terminating the 1954 treaty. Under customary international law, a nation cannot use a change of conditions as a ground for terminating a treaty if the change is the result of its own action, inconsistent with the original purposes of the treaty.

In any event, President Carter is not asserting changed circumstances as a ground of his notice; he claims implied authority solely under the notice provision of the treaty. Thus, the 1933 incident has no similarity to the present case.

6. In 1933, President Roosevelt gave notice of termination of the 1931 Treaty of Extradition with Greece.

Analysis: The treaty was not terminated. The sole basis for the President's notice was violation of the treaty by the other nation, a charge that has not been made against the Republic of China.

Discussion: The incident was not a precedent for Presidential treaty termination because the treaty was not terminated. President Roosevelt did give notice, but withdrew it. Whether he would have completed the termination is speculation; the strongest evidence points to his purpose only of using the threat of termination as pressure for negotiating purposes.

The President's action was initiated because Greece had refused to extradite an individual accused of fraud as required under the extradition agreement. Clearly, his action was founded on the fact the treaty had already been violated by breach of the other party. The President may have power to determine that a treaty has become void in this narrow situation under the ancient principle of traditional contract law whereby a party is released from a contract obligation if the other party is guilty of a substantial breach.

Even so, the principle has no application to the 1954 defense treaty. The Republic of China has not committed any breach of the treaty, nor is any violation on her part alleged. In contrast, the 1933 notice by President Roosevelt clearly identified the violation by Greece of the treaty as the reason for the notice.

7. In 1936, President Roosevelt signed a protocol agreeing with Italy to terminate the 1871 Treaty of Commerce and Navigation.

Analysis: The 1871 treaty had become inconsistent with a later Act of Congress which conferred implied authority upon the President. Also, the treaty was terminated in joint action with the other country by a protocol mutually agreed upon. In contrast, the Republic of China wishes to keep in effect the 1954 defense treaty.

Discussion: President Roosevelt's action in agreeing with Italy to terminate the 1871 treaty arose directly out of and was tied to the 1934 trade law enacted by Congress. That law authorized the President to suspend beneficial duties to imports from any country discriminating against our exports. Since American commerce was being subjected to what the State Department described as "highly prejudicial treatment" by the trade control measures of Italy, the Department warned the President he "would be placed in the position of having to choose between the execution of the act and observance of the treaty."

In order to avoid being forced to breach the treaty or ignore the obvious intent of the statute, the State Department advised the President to notify Italy of our intent to terminate the treaty. (G. Hackworth, 5 Digest of International Law 330-331 (1943).)

Thus, the statute conferred implied authority on the President to terminate the treaty. In the present case, President Carter has no implied or express authority under a separate statute.

Instead of giving the initial, formal notice to Italy of the treaty's termination as suggested, President Roosevelt approved a joint protocol entered into between the United States and Italy announcing the intention of each government to terminate the treaty. Thus, the treaty was not cancelled by Presidential notice alone, as is proposed in the case of the 1954 treaty with the Republic of China, but by mutual agreement with the other government.

8. In 1939, President Roosevelt gave notice of termination of the 1911 Treaty of Commerce and Navigation with Japan.

Analysis: The 1911 commercial treaty was clearly terminated pursuant to national policy authorized by the Nine Power Treaty of 1922. Also the 1911 treaty had become inoperative due to wartime conditions.

Discussion: The termination of the 1911 commercial treaty with Japan is not an example of independent Presidential power. Under the Treaty on Principles and Policies Concerning China of 1922, known as the Nine Power Agreement, the United States was bound to participate with other governments in respecting the territorial integrity of China. In the first article of that treaty, the contracting governments pledged to "respect the sovereignty, the independence, and the territorial and administrative integrity of China," promised to give China the opportunity to develop a stable government, and to respect an open door for commerce and industry. (Foreign Relations, 1922, vol. I, pp. 278-279)

As early as February of 1932, Secretary of State Stimson made it clear this treaty was being violated by Japan. He hinted future American action to implement our responsibilities under the treaty and was a well-known advocate of strong economic sanctions against Japan as a means of pressuring her to uphold the Nine Power Treaty and the Kellogg-Briand Pact of 1928, which purportedly renounced war as an instrument of national policy. (See text of letter reprinted in 84 Cong. Rec. 10751-10752; as to Stimson's approach to Japan, see W. Neumann, "America Encounters Japan," 1963, pp. 195-201.)

Partly because Japan was the third largest purchaser of American exports at a time when foreign trade was considered vital to economic recovery, President Hoover and then President Roosevelt refused at first to be pushed into extreme acts of economic warfare against Japan. But continued Japanese aggression and the U.S. commitment to China caused a turn in American policy. (Neumann, id., pp. 212-227)

For the early 1930's, Japan repudiated the Kellogg-Briand Pact, withdrew from the 1921 treaty restricting naval fleets, and overran Manchuria. After she entered upon all-out war against China in 1937, it was apparent that Imperial Japan had the same designs in the Far East that Nazi Germany had in Europe. (Barck, Wakefield, Lefler, "The United States: A Survey of National Development," 1950, pp. 899-900.)

The outbreak of war in 1937 led to strong public appeals for a boycott of Japanese goods and for the application of other economic pressures which would cause Japan to withdraw from China. President Roosevelt moved in the direction of this changing public opinion when he made his famous "Quarantine" speech on October 5, 1937. In this speech, he declared that war was becoming a contagion whose spread could be stopped only by a "quarantine" against aggressors. The Japanese made a partial answer to this speech on December 12, 1937, when their planes sunk the U.S. gunboat Panay in the Yangtze River, with the loss of two dead and 30 wounded, and destroyed three American merchantmen.

According to historian William Neumann, "the subject of economic sanctions was studied and discussed in the State Department" throughout 1938. (Neumann, id., p. 253.) In fact, by the middle of 1938, the State Department informed all manufacturers and exporters of aircraft and airplane parts that it frowned upon the sale of such commodities to countries, as Japan, which indiscriminately bombed civilians. In 1939, this voluntary ban was extended to high octane gasoline. These warnings were heeded by the producers with the result that a virtual embargo on planes, parts and gasoline was raised against Japan. In a similar approach, the State Department gradually ended the extension of credit to Japan by American citizens after 1938. (Barck, Wakefield, Lefler, id., p. 904.)

Stanley K. Hornbeck, Adviser on Political Relations to the Secretary of State, was one of the most influential believers in economic pressure as an instrument of American policy in Asia. In December of 1938, he specifically proposed to Secre-



tary Hull the denunciation of the 1911 commercial treaty with Japan in order to clear away legal difficulties to such a program of economic sanctions. (Neumann, id., pp. 240-246, '53.)

Thus, in July of 1939, when Secretary Hull finally informed Tokyo that the United States would abrogate the commercial treaty, his action was part-and-parcel of an on-going American embargo that had already been mounted against Japan, primarily by moral persuasion. Neumann writes that termination of the commercial treaty was necessary to enable the Roosevelt administration "to begin full scale economic war against Japan" as a measure short of war designed to help China. (Neumann, id., pp. 254-255.)

In similar vein, Charles E. Neu writes that Roosevelt gave notice so that "the way would be open for trade restrictions" which would warn Tokyo and "strengthen the morale of China." (Neu, "The Troubled Encounter: The United States and Japan," 1975, p. 163) And James H. Herzog writes that with notice of the treaty's termination, the United States had taken a positive step "which would allow economic sanctions to be used against Japan." He, too, specifically links the notice with Japan's aggression against China. (Herzog, "Closing the Open Door: American-Japanese Diplomatic Negotiations 1936-1941," 1973, pp. 46-47.)

From this, it is undeniable that the notice was an integral part of American policy which took a no-compromise stand on behalf of the territorial integrity of China. Clearly, this policy of morality on behalf of the welfare of China was exactly the type of governmental action contemplated and authorized by the Nine Power Treaty. Thus, President Roosevelt's notice was authorized by a formal treaty ratified with the advice and consent of the Senate.

The aggression by Japan, even against U.S. vessels, also created a fundamental change in circumstances not the result of our personal actions. Absent a Supreme Court decision of the issue, it is not known whether the President acts legally when he invokes the doctrine of "rebus sic stantibus," but this principle of international law would at least have given President Roosevelt an additional plausible ground for independent action.

In the present case, neither any asserted authority under a related treaty subsequent in time to the 1954 treaty, nor the principle of "rebus sic stantibus" has been invoked by President Carter.

9. In 1944, President Roosevelt gave notice of denunciation of the 1929 Protocol to the Inter-American Convention for Trademark and Commercial Protection.

Analysis: Denunciation of the 1929 Protocol is at most an example of an international agreement becoming inoperative when the basic conditions upon which it was founded have essentially changed and the change is not the result of any action by the nation deciding to withdraw. Moreover, Congress was not informed of the notice and was denied any opportunity to challenge the action.

Discussion: The notice of denunciation of the 1929 protocol expressly stated that it had failed to serve any purpose. Secretary of State Hull explained the United States had decided to withdraw from the protocol "in view of past ineffectiveness and absence of any evidence of future increased activity."

Accordingly, the situation fits the classic case of invoking the principle of international law known as "rebus sic stantibus," described in an Attorneys' General Opinion of July 28, 1941, as "a declaration of the inoperativeness of a treaty which is no longer binding because the conditions essential to its continued effectiveness no longer pertain." (40 OP.A.G. 119.)

Even so, the incident may have been an improper exercise of power by the President. Assuming for the sake of argument, however, that the notice was legally made, the action can be explained under the principles of ordinary contract law. The principle of "rebus sic stantibus" was known to international law authorities at the time of the Constitutional Convention of 1787. Vattel, Grotius and other writers, whose works were read by several of the Framers, each mentioned that one of the implied conditions inherent in public contracts, such as a treaty, was the right of a government to consider itself no longer bound by the agreement when fundamental conditions assumed as the basis of the contract no longer existed.

There is no similar, well-established principle of international law, however, providing that in a government of divided powers as ours, the Executive alone possesses a general power of treaty termination. The principle of "rebus sic stantibus" does not apply to President Carter's notice affecting the treaty with the Republic of China; nor has he sought to invoke the principle. Rather, he is claiming a general power of terminating any treaty which includes a notice provision, regardless of any special surrounding circumstances.

Moreover, the State Department memo admits at page 27 that there "was no prior or subsequent communication" of the 1944 notice with the Senate or Congress. Thus, the notice was in effect kept secret from Congress and did not present an opportunity for challenge in the courts.

10. In 1954, President Eisenhower gave notice of withdrawal from the 1923 Convention on Uniformity of Nomenclature for the Classification of Merchandise.

Analysis: The United States withdrew from the 1923 Convention because it had been "rendered inapplicable" by a basic change in conditions not the result of our government's actions. Also, termination of the Convention was done with the agreement of other parties.

Discussion: The 1954 notice is a classic example of the application of the principle of international law known as "rebus sic stantibus," discussed above.

The 1923 Convention relied on use of the Brussels nomenclature of 1913 in statistical reporting of international commerce. In the words of the State Department memo, at page 29, "the Brussels system of 1913 had become outdated."

In 1950, the United Nations Economic and Social Council had urged governments to use a new system known as the Standard International Trade Classification instead of the Brussels system. Then in 1954, the 10th Inter-American Conference of American States adopted a resolution on customs nomenclature which specifically declared that "the Brussels nomenclature of 1913 has become outdated and has thereby rendered inapplicable the Santiago Convention on Uniformity of Nomenclature for the Classification of Merchandise \* \* \*". The resolution urged member nations to abandon the 1923 Convention and adopt the new United Nations-sponsored system.

The United States notice of withdrawal from the convention acted upon the wide agreement of other governments, who were parties to it, that the convention was no longer applicable to current conditions. It is obvious a fundamental change of conditions had occurred. If the basic system of statistical reporting had become "outdated" and governments generally wished to adopt a new system to replace the old, and if governments generally viewed this change as having "rendered inapplicable" the 1923 Convention which utilized the earlier reporting system, these facts surely must constitute a fundamental change in the basic conditions upon which the convention was founded.

Unlike the situation as to the 1923 convention, there is no argument by President Carter that a basic element of the Mutual Defense Treaty with the Republic of China has become "outdated." Nor is there any claim the defense treaty has been "rendered inapplicable." To the contrary, it has an even greater significance to the people and authorities of Taiwan after the recognition of the Peoples Republic of China by the United States; and it remains significant to United States security interests in the Pacific Basin.

Moreover, unlike the situation with the 1923 convention, where there was widespread agreement among parties to the convention that it should be abandoned, here the Republic of China wishes to keep the defense treaty in effect. Whatever the President's power may be to act by agreement with other parties to a treaty in denouncing it, this does not create a general power of unilaterally deciding to withdraw from a bilateral treaty when the other nation does not agree or join his action.

One of the specific defects meant to be corrected by the Framers of the Constitution was the unfaithfulness of the United States under the Articles of Confederation in keeping its treaty obligations. Several of the Framers declared the Constitution was supposed to aid in restoring respect to the United States as a treaty partner. Thus, it is exactly the easy escape from a treaty represented by President Carter's unilateral notice, not in agreement with our foreign treaty partner, that the Framers wanted to prevent.

11. In 1962, President Kennedy gave notice of termination of the 1902 Convention on Commercial Relations with Cuba.

Analysis: The President's action clearly was authorized by several statutes and one other treaty.

Discussion: The termination of the 1902 commercial convention was an integral part of the U.S. economic embargo of Castro Cuba, declared on February 2, 1962, in which we were joined by the Organization of American States. (13 CQ Almanac 295-298, 331, 333 (1962).)

President Kennedy's notice of August 21, 1962, occurred only eight weeks before the naval blockade of Cuba. He had ample authority to impose a trade embargo under provisions of the Foreign Assistance Act of 1961, the Export-Control Act of 1948, the Trading with the Enemy Act, and Battle Act of 1954. Termination of the convention was also authorized pursuant to the Inter-American Treaty of



Reciprocal Assistance of 1947, which contemplated a "partial or complete interruption of economic relations" as a means of enforcement. Thus, notice of terminating the commercial convention was given pursuant to a national policy authorized and developed with full legislative participation.

Moreover, the notice may have been authorized under implied authority conferred by Congress when it enacted the Tariff Act of 1945 (59 Stat. 410).

Under the specific authority granted by this statute, the United States Government had entered into numerous trade agreements with other nations by executive agreement through the General Agreement on Tariffs and Trade (GATT). Pursuant to authority granted by the same trade statute, the commercial treaty with Cuba had already been suspended by an executive agreement with Cuba. Thus, it is possible the notice of termination would have been made even had the United States not been engaged in an embargo of Cuba.

However, had the notice been given in the absence of the embargo policy, it still would have been authorized by the enabling statute which set in motion the GATT process on the part of the United States. In either event, the President's action was exercised under the authority of Acts of Congress. In contrast, there is no past or current statute which is cited as having any plausible bearing on the notice given by President Carter. His notice was given in the absence of any separate, supporting legislative enactment and rests solely on the President's unilateral and self-serving interpretation of the Mutual Defense Treaty.

12. In 1965, President Johnson gave notice of denunciation of the 1929 Warsaw Convention limiting claims by passengers on international air carriers.

Analysis: Our government's participation in the Convention was not terminated; President Johnson withdrew the notice. It is not a precedent for Presidential termination. The Convention was widely viewed in this country as being outdated and, in fact, was being ignored by American courts. At most, the incident is an example of a treaty becoming inoperative due to changed conditions.

Discussion: The United States did not withdraw from the Warsaw Convention. It is pure speculation to assume President Johnson would have denounced the agreement unilaterally. To the contrary, it appears he used the threat of U.S. withdrawal as leverage in negotiations with other nations leading to acceptance of a protocol to the convention favorable to our wishes for a sizable increase in the ceiling on claims awarded to air passengers. The incident is not a precedent for Presidential termination of a treaty because President Johnson did not actually denounce a treaty.

There was strong support in the Senate and the country for U.S. withdrawal from the convention. An unfortunate tragedy had befallen then Senator Capehart, whose son and daughter-in-law were killed in a plane crash in Jamaica on January 21, 1960, leaving four young children orphaned. The survivors were clearly entitled to recover damages against the grossly negligent airline, however the Warsaw Convention limited liability to \$8,300. Lawyers for the airline literally waved the convention in Senator Capehart's face in refusing initially to pay a realistic award to his relatives. Only court proceedings eventually forced the airline to settle at a higher amount.

With the personal experience of one of their colleagues much in mind, many Senators were revolted at the deficiencies in the Warsaw Convention. Their attitude was reinforced by testimony before the Foreign Relations Committee by trial attorneys who demonstrated that the convention was "outdated, archaic" and further that the proposed Hague Protocol to the convention was inadequate in lifting airline liability to a sufficient amount.

It was established at the Senate hearings that American courts had successfully avoided the limits of the convention by developing a judicial principle which allowed exceptions to the convention in cases of "willful misconduct" by an airline. The exception had become the norm in U.S. courts and the convention had been effectively replaced by legal practice. (Hearings on the Hague Protocol before Senate Foreign Relations Committee, 89th Con., 1st Sess., 1965, at 41, 59.)

In this setting, there was a basic change in conditions. The convention had become inapplicable in U.S. courts and outdated as practical matter. Moreover, its original purpose had been met. It was adopted to help fledgling airlines, now become strong carriers. If President Johnson had denounced it, his action would have been consistent with the principle of international law known as "rebus sic stantibus," discussed above. The principle has no application to the defense treaty with the Republic of China. Unlike the history of the Warsaw Convention in the mid-1960's, there is no line of consistent judicial decisions disregarding the defense treaty. There is no similarity between the two situations.

Moreover, as Lee S. Kreindler, Chairman, Aviation Law Section, American Trial Lawyers Association, testified at the Senate Committee hearings: "It should be pointed out that the Warsaw Convention is a 'private law' treaty which only regulates rights and liabilities as between private individuals and corporations. It does not involve real interests of governments as such. Whatever reluctance there might be to withdraw from a public law treaty involving the performance of governmental responsibilities, it does not apply to the Warsaw Convention which only regulates rights between private persons." (Hearings at 106.)

Thus, there is a critical difference between the Warsaw Convention and the Mutual Defense Treaty. The latter is a "public" treaty involving the performance of governmental duties. Even if, for the sake of argument, the President has power to terminate treaties involving "private rights," it does not follow that he has power to revoke a treaty which involves fundamental policy for the country on a matter of vital interest to all the people.

It is true, 29 Senators joined in sponsoring a Senate Resolution urging President Johnson to denounce the Warsaw Convention. The resolution was introduced several months after he had given notice and anticipated that the notice might be withdrawn. It is wrong to infer from this that the 29 Senators, or a majority of the Senate, believed the President possessed authority to denounce the convention absent legislative action. In fact, the very act of introducing or cosponsoring the legislation was an affirmative action which in the normal process of legislative activity would result, if successful, in a grant of authority or ratification by the Senate of Presidential action as required by the Constitution. From this, the logical conclusion is that the Senators sponsoring the resolution believed legislative participation was necessary to fulfill the decision to denounce the convention.

[Whereupon, at 4 p.m. the subcommittee adjourned, to reconvene at the call of the Chair.]





## APPENDIX 1

### STATEMENT BY PRESIDENT JIMMY CARTER TO THE NATION, DECEMBER 15, 1978

I would like to read a joint communique which is being simultaneously issued in Peking at this very moment by the leaders of the People's Republic of China.

The United States of America and the People's Republic of China have agreed to recognize each other and to establish diplomatic relations as of January 1, 1979.

The United States of America recognizes the Government of the People's Republic of China as the sole legal Government of China. Within this context, the people of the United States will maintain cultural, commercial, and other unofficial relations with the people of Taiwan.

The United States of America and the People's Republic of China reaffirm the principles agreed on by the two sides in the Shanghai Communique and emphasize once again that:

Both wish to reduce the danger of international military conflict.

Neither should seek hegemony in the Asia-Pacific region or in any other region of the world and each is opposed to efforts by any other country or group of countries to establish such hegemony.

Neither is prepared to negotiate on behalf of any third party or to enter into agreements or understandings with the other directed at other states.

The Government of the United States of America acknowledges the Chinese position that there is but one China and Taiwan is part of China.

Both believe that normalization of Sino-American relations is not only in the interest of the Chinese and American people but also contributes to the cause of peace in Asia and the world.

The United States of America and the People's Republic of China will exchange Ambassadors and establish Embassies on March 1, 1979.

Yesterday, our country and the People's Republic of China reached this final historic agreement. On January 1, 1979, a little more than 2 weeks from now, our two governments will implement full normalization of diplomatic relations.

As a nation of gifted people who comprise about one-fourth of the total population of the Earth, China plays, already, an important role in world affairs, a role that can only grow more important in the years ahead.

We do not undertake this important step for transient tactical or expedient reasons. In recognizing the People's Republic of China, that it is the single Government of China, we are recognizing simple reality. But far more is involved in this decision than just the recognition of a fact.

Before the estrangement of recent decades, the American and the Chinese people had a long history of friendship. We've already begun to rebuild some of those previous ties. Now our rapidly expanding relationship requires the kind of structure that only full diplomatic relations will make possible.

The change that I'm announcing tonight will be of great long-term benefit to the peoples of both our country and China—and, I believe, to all the peoples of the world. Normalization—and the expanded commercial and cultural relations that it will bring—will contribute to the well-being of our own nation, to our own national interest, and it will also enhance the stability of Asia. These more positive relations with China can beneficially affect the world in which we live and the world in which our children will live.

We have already begun to inform our allies and other nations and the Members of the Congress of the details of our intended action. But I wish also tonight to convey a special message to the people of Taiwan—I have already communicated with the leaders in Taiwan—with whom the American people have had and will have extensive, close, and friendly relations. This is important between our two peoples.

As the United States asserted in the Shanghai communique of 1972, issued on President Nixon's historic visit, we will continue to have an interest in the peace-



ful resolution of the Taiwan issue. I have paid special attention to insuring that normalization of relations between our country and the People's Republic will not jeopardize the well-being of the people of Taiwan. The people of our country will maintain our current commercial, cultural, trade, and other relations with Taiwan through nongovernmental means. Many other countries in the world are already successfully doing this.

These decisions and these actions open a new and important chapter in our country's history and also in world affairs.

To strengthen and to expedite the benefits of this new relationship between China and the United States, I am pleased to announce that Vice Premier Teng has accepted my invitation and will visit Washington at the end of January. His visit will give our governments the opportunity to consult with each other on global issues and to begin working together to enhance the cause of world peace.

These events are the final result of long and serious negotiations begun by President Nixon in 1972 and continued under the leadership of President Ford. The results bear witness to the steady, determined, bipartisan effort of our own country to build a world in which peace will be the goal and the responsibility of all nations.

The normalization of relations between the United States and China has no other purpose than this: the advancement of peace. It is in this spirit, at this season of peace, that I take special pride in sharing this good news with you tonight.

#### U.S. STATEMENT

As of January 1, 1979, the United States of America recognizes the People's Republic of China as the sole legal government of China. On the same date, the People's Republic of China accords similar recognition to the United States of America. The United States thereby establishes diplomatic relations with the People's Republic of China.

On that same date, January 1, 1979, the United States of America will notify Taiwan that it is terminating diplomatic relations and that the Mutual Defense Treaty between the U.S. and the Republic of China is being terminated in accordance with the provisions of the Treaty. The United States also states that it will be withdrawing its remaining military personnel from Taiwan within four months.

In the future, the American people and the people of Taiwan will maintain commercial, cultural, and other relations without official diplomatic relations.

The Administration will seek adjustments to our laws and regulations to permit the maintenance of commercial, cultural, and other non-governmental relationships in the new circumstances that will exist after normalization.

The United States is confident that the people of Taiwan face a peaceful and prosperous future. The United States continues to have an interest in the peaceful resolution of the Taiwan issue and expects that the Taiwan issue will be settled peacefully by the Chinese themselves.

The United States believes that the establishment of diplomatic relations with the People's Republic will contribute to the welfare of the American people, to the stability of Asia where the United States has major security and economic interest, and to the peace of the entire world.

## APPENDIX 2

### LETTER TO THE PRESIDENT FROM CHAIRMAN CLEMENT J. ZABLOCKI AND HON. LESTER L. WOLFF

CONGRESS OF THE UNITED STATES,  
COMMITTEE ON INTERNATIONAL RELATIONS,  
HOUSE OF REPRESENTATIVES,  
Washington, D.C., December 19, 1978.

HON. JIMMY CARTER,  
*The President,*  
*The White House, Washington, D.C.*

DEAR MR. PRESIDENT: The implications of your December 15 announcement regarding normalization of relations with the People's Republic of China are more far-reaching than any of us can comprehend at this time. While some of us may have reservations regarding the timing, method and substance of your decision, our purpose in writing now is not to take issue with those aspects of the question, important and serious as they might be.

Rather, in the strongest possible terms, we wish to register our concern, displeasure and dismay over the cavalier way in which this decision was conveyed to the Congress. In particular, we object to the fact that the only information available to the Congress on this matter came from representatives of the media hours before you briefed members of the Congress at 6:15 p.m. only two hours and 45 minutes before you were scheduled to make the public announcement.

In particular, we object most to the fact that the provisions of Section 26 of the International Security Assistance Act of 1978, (P.L. 95-384), which became law on September 26, 1978 were not complied with. As you know, subsection (b) of Section 26 states that "It is the sense of the Congress that there should be prior consultation between the Congress and the executive branch on any proposed policy changes affecting the continuation in force of the Mutual Defense Treaty of 1954."

Mr. President, we have long believed that for consultation to be truly meaningful and effective it must be timely enough for Congressional views to be taken into consideration. Further, we have repeatedly stressed that merely informing Congress of decisions already taken does not constitute adequate consultation. Certainly, being informed of a decision of such consequence less than three hours before a public announcement cannot in any way be construed as consultation.

We have been pleased with your policy regarding prior consultation with Congress to which you have committed your Administration and which you have, with few exceptions, practiced up to now. Unfortunately, this step contradicts that record.

As we have indicated on several occasions, we are prepared to support your policies wherever and whenever we are able. To do so, however, we must know what those policies are going to be in sufficient time to work out any problems that some, or all, of us may have, with respect to a particular decision.

In closing, we would like to point out that we recognize that diplomacy cannot always be conducted in public and that there may be a need for secrecy. Nevertheless we feel that we are patriotic enough and responsible enough to be consulted during the decision-making process instead of being confronted with a fait accompli.

Mr. President, we would hope that you will accept this letter in the spirit in which it is written. We want to support you. To do this you must have the confidence in us that you expect us to have in you.

In closing, we wish to take this opportunity to wish you and yours a happy, Merry Christmas, and the happiest of New Years.

With best wishes,

Sincerely yours,

CLEMENT J. ZABLOCKI, M.C.  
LESTER L. WOLFF, M.C.



### APPENDIX 3

LETTER TO HON. LESTER L. WOLFF FROM FORMER PRESIDENT NIXON

RICHARD NIXON,  
LA CASA PACIFICA.

*San Clemente, Calif., February 14, 1979.*

HON. LESTER L. WOLFF,  
*Chairman, Subcommittee on Asian and Pacific Affairs,  
House of Representatives, Washington, D.C.*

DEAR MR. CHAIRMAN: With regard to your letter of February 2, I must respectfully decline your invitation to testify before your subcommittee. I see no useful purpose to be served by my trying to second-guess President Carter's P.R.C. normalization decision. Any one of us might have handled the situation differently, but now the decision has been made we should look to the future and not to the past.

With regard to the questions you raised in your letter, Dr. Kissinger and I had extensive discussions with Chairman Mao and Premier Chou En-lai on the Taiwan issue in 1972. We could not reach an agreement and consequently stated our positions separately in the Shanghai Communiqué. In that document the U.S. "reaffirmed" its support of a peaceful resolution of the Taiwan issue. I consider that to be an unequivocal moral commitment. In my view U.S. policies toward the P.R.C. and Taiwan in the future should be formulated in a way to honor that commitment.

Normalization of U.S. relations with the P.R.C. is indispensable in furthering our goal of building a structure of peace in Asia and the world. But at a time when U.S. credibility as a dependable ally and friend is being questioned in a number of countries, it is also vitally important that the Taiwan issue be handled in a way which will reassure other nations—whether old friends, new friends, potential friends or wavering friends—that it is safe to rely on America's word and to be America's friend.

Sincerely,

RICHARD NIXON.

## APPENDIX 4

### TEXT OF MUTUAL DEFENSE TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE REPUBLIC OF CHINA

Signed at Washington December 2, 1954; Ratification advised by the Senate of the United States of America February 9, 1955; Ratified by the President of the United States of America February 11, 1955; Ratified by the Republic of China February 15, 1955; Ratifications exchanged at Taipei March 3, 1955; Proclaimed by the President of the United States of America April 1, 1955; Entered into force March 3, 1955  
The Parties to this Treaty,

Reaffirming their faith in the purposes and principles of the Charter of the United Nations and their desire to live in peace with all peoples and all Governments, and desiring to strengthen the fabric of peace in the West Pacific Area,

Recalling with mutual pride the relationship which brought their two peoples together in a common bond of sympathy and mutual ideals to fight side by side against imperialist aggression during the last war,

Desiring to declare publicly and formally their sense of unity and their common determination to defend themselves against external armed attack, so that no potential aggressor could be under the illusion that either of them stands alone in the West Pacific Area, and

Desiring further to strengthen their present efforts for collective defense for the preservation of peace and security pending the development of a more comprehensive system of regional security in the West Pacific Area,

Have agreed as follows:

#### ARTICLE I

The Parties undertake, as set forth in the Charter of the United Nations, to settle any international dispute in which they may be involved by peaceful means in such a manner that international peace, security and justice are not endangered and to refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the United Nations.

#### ARTICLE II

In order more effectively to achieve the objective of this Treaty, the Parties separately and jointly by self-help and mutual aid will maintain and develop their individual and collective capacity to resist armed attack and communist subversive activities directed from without against their territorial integrity and political stability.

#### ARTICLE III

The Parties undertake to strengthen their free institutions and to cooperate with each other in the development of economic progress and social well-being and to further their individual and collective efforts towards these ends.

#### ARTICLE IV

The Parties, through their Foreign Ministers or their deputies, will consult together from time to time regarding the implementation of this Treaty.

#### ARTICLE V

Each Party recognizes that an armed attack in the West Pacific Area directed against the territories of either of the Parties would be dangerous to its own peace and safety and declares that it would act to meet the common danger in accordance with its constitutional processes.

Any such armed attack and all measures taken as a result thereof shall be immediately reported to the Security Council of the United Nations. Such meas-



ures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.

#### ARTICLE VI

For the purposes of Articles II and V, the terms "territorial" and "territories" shall mean in respect of the Republic of China, Taiwan and the Pescadores; and in respect of the United States of America, the island territories in the West Pacific under its jurisdiction. The provisions of Articles II and V will be applicable to such other territories as may be determined by mutual agreement.

#### ARTICLE VII

The Government of the Republic of China grants, and the Government of the United States of America accepts, the right to dispose such United States land, air and sea forces in an about Taiwan and the Pescadores as may be required for their defense, as determined by mutual agreement.

#### ARTICLE VIII

This Treaty does not affect and shall not be interpreted as affecting in any way the rights and obligations of the Parties under the Charter of the United Nations or the responsibility of the United Nations for the maintenance of international peace and security.

#### ARTICLE IX

This Treaty shall be ratified by the United States of America and the Republic of China in accordance with their respective constitutional processes and will come into force when instruments of ratification thereof have been exchanged by them at Taipei.

#### ARTICLE X

This Treaty shall remain in force indefinitely. Either Party may terminate it one year after notice has been given to the other Party.

#### EXCHANGE OF NOTES

DEPARTMENT OF STATE,  
Washington, D.C., December 10, 1954.

HIS EXCELLENCY GEORGE K. C. YEIL,  
*Minister of Foreign Affairs of the Republic of China.*

EXCELLENCY: I have the honor to refer to recent conversations between representatives of our two Governments and to confirm the understanding reached as a result of those conversations, as follows:

The Republic of China effectively controls both the territory described in Article VI of the Treaty of Mutual Defense between the Republic of China and the the United States of America signed on December 2, 1954, at Washington and other territory. It possesses with respect to all territory now and hereafter under its control the inherent right of self-defense. In view of the obligations of the two Parties under the said Treaty, and of the fact that the use of force from either of these areas by either of the Parties affects the other, it is agreed that such use of force will be a matter of joint agreement, subject to action of an emergency character which is clearly an exercise of the inherent right of self-defense. Military elements which are a product of joint effort and contribution by the two Parties will not be removed from the territories described in Article VI to a degree which would substantially diminish the defensibility of such territories without mutual agreement.

Accept, Excellency, the assurances of my highest consideration.

/s/ JOHN FOSTER DULLES,  
*Secretary of State of the United States of America.*

HIS EXCELLENCY JOHN FOSTER DULLES,  
*Secretary of State of the United States of America.*

EXCELLENCY: I have the honor to acknowledge the receipt of Your Excellency's Note of today's date, which reads as follows:

"I have the honor to refer to recent conversations between representatives of our two Governments and to confirm the understandings reached as a result of those conversations, as follows:

"The Republic of China effectively controls both the territory described in Article VI of the Treaty of Mutual Defense between the Republic of China and the United States of America signed on December 2, 1954, at Washington and other territory. It possesses with respect to all territory now and hereafter under its control the inherent right of self-defense. In view of the obligations of the two Parties under the said Treaty and of the fact that the use of force from either of these areas by either of the Parties affects the other, it is agreed that such use of force will be a matter of joint agreement, subject to action of an emergency character which is clearly an exercise of the inherent right of self-defense. Military elements which are a product of joint effort and contribution by the two Parties will not be removed from the territories described in Article VI to a degree which would substantially diminish the defensibility of such territories without mutual agreement."

I have the honor to confirm, on behalf of my Government, the understanding set forth in Your Excellency's Note under reply.

I avail myself of this opportunity to convey to Your Excellency the assurance of my highest consideration.

GEORGE K. C. YEH,  
*Minister for Foreign Affairs of the Republic of China.*



## APPENDIX 5

### TEXT OF THE TAIWAN LEGISLATION ADOPTED BY THE CONGRESS, AND SIGNED INTO LAW BY PRESIDENT CARTER ON APRIL 10, 1979

#### TAIWAN RELATIONS ACT

[Public Law 96-8, Apr. 10, 1979, 93 Stat. 14]

An Act To help maintain peace, security, and stability in the Western Pacific and to promote the foreign policy of the United States by authorizing the continuation of commercial, cultural, and other relations between the people of the United States and the people on Taiwan, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

#### SHORT TITLE

SECTION 1. This Act may be cited as the "Taiwan Relations Act".

#### FINDINGS AND DECLARATION OF POLICY

SEC. 2. (a) The President having terminated governmental relations between the United States and the governing authorities on Taiwan recognized by the United States as the Republic of China prior to January 1, 1979, the Congress finds that the enactment of this Act is necessary—

- (1) to help maintain peace, security, and stability in the Western Pacific; and
  - (2) to promote the foreign policy of the United States by authorizing the continuation of commercial, cultural, and other relations between the people of the United States and the people on Taiwan.
- (b) It is the policy of the United States—
- (1) to preserve and promote extensive, close, and friendly commercial, cultural, and other relations between the people of the United States and the people on Taiwan, as well as the people on the China mainland and all other peoples of the Western Pacific area;
  - (2) to declare that peace and stability in the area are in the political, security, and economic interests of the United States, and are matters of international concern;
  - (3) to make clear that the United States decision to establish diplomatic relations with the People's Republic of China rests upon the expectation that the future of Taiwan will be determined by peaceful means;
  - (4) to consider any effort to determine the future of Taiwan by other than peaceful means, including by boycotts or embargoes, a threat to the peace and security of the Western Pacific area and of grave concern to the United States;
  - (5) to provide Taiwan with arms of a defensive character; and
  - (6) to maintain the capacity of the United States to resist any resort to force or other forms of coercion that would jeopardize the security, or the social or economic system, of the people on Taiwan.
- (c) Nothing contained in this Act shall contravene the interest of the United States in human rights, especially with respect to the human rights of all the approximately eighteen million inhabitants of Taiwan. The preservation and enhancement of the human rights of all the people on Taiwan are hereby reaffirmed as objectives of the United States.

## IMPLEMENTATION OF UNITED STATES POLICY WITH REGARD TO TAIWAN

SEC. 3. (1) In furtherance of the policy set forth in section 2 of this Act, the United States will make available to Taiwan such defense articles and defense services in such quantity as may be necessary to enable Taiwan to maintain a sufficient self-defense capability.

(b) The President and the Congress shall determine the nature and quantity of such defense articles and services based solely upon their judgment of the needs of Taiwan, in accordance with procedures established by law. Such determination of Taiwan's defense needs shall include review by United States military authorities in connection with recommendation to the President and the Congress.

(c) The President is directed to inform the Congress promptly of any threat to the security or the social or economic system of the people on Taiwan and any danger to the interests of the United States arising therefrom. The President and the Congress shall determine, in accordance with constitutional processes, appropriate action by the United States to any such danger.

## APPLICATION OF LAWS; INTERNATIONAL AGREEMENTS

SEC. 4. (a) The absence of diplomatic relations or recognition shall not affect the application of the laws of the United States with respect to Taiwan, and the laws of the United States shall apply with respect to Taiwan in the manner that the laws of the United States applied with respect to Taiwan prior to January 1, 1979.

(b) The application of subsection (a) of this section shall include, but shall not be limited to, the following:

(1) Whenever the laws of the United States refer or relate to foreign countries, nations, states, governments, or similar entities, such terms shall include and such laws shall apply with respect to Taiwan.

(2) Whenever authorized by or pursuant to the laws of the United States to conduct or carry out programs, transactions, or other relations with respect to foreign countries, nations, states, governments, or similar entities, the President or any agency of the United States Government is authorized to conduct and carry out, in accordance with section 6 of this Act, such programs transactions, and other relations with respect to Taiwan (including, but not limited to, the performance of services for the United States through contracts with commercial entities on Taiwan), in accordance with the applicable laws of the United States.

(3) (A) The absence of diplomatic relations and recognition with respect to Taiwan shall not abrogate, infringe, modify, deny, or otherwise affect in any way any rights or obligations (including but not limited to those involving contracts, debts, or property interests of any kind) under the laws of the United States heretofore or hereafter acquired by or with respect to Taiwan.

(B) For all purposes under the laws of the United States, including actions in any court in the United States, recognition of the People's Republic of China shall not affect in any way the ownership of or other rights or interests in properties, tangible and intangible, and other things of value, owned or held on or prior to December 31, 1978, or thereafter acquired or earned by the governing authorities on Taiwan.

(4) Whenever the application of the laws of the United States depends upon the law that is or was applicable on Taiwan or compliance therewith, the law applied by the people on Taiwan shall be considered the applicable law for that purpose.

(5) Nothing in this Act, nor the facts of the President's action in extending diplomatic recognition to the People's Republic of China, the absence of diplomatic relation between the people on Taiwan and the United States, or the lack of recognition by the United States, and attendant circumstances thereto, shall be construed in any administrative or judicial proceeding as a basis for any United States Government agency, commission, or department to make a finding of fact or determination of law, under the Atomic Energy Act of 1954 and the Nuclear Non-Proliferation Act of 1978, to deny an export license application or to revoke an existing export license for nuclear exports to Taiwan.

(6) For purposes of the Immigration and Nationality Act, Taiwan may be treated in the manner specified in the first sentence of section 202(b) of that Act.



(7) The capacity of Taiwan to sue and be sued in courts in the United States, in accordance with the laws of the United States, shall not be abrogated, infringed, modified, denied, or otherwise affected in any way by the absence of diplomatic relations or recognition.

(8) No requirement, whether expressed or implied, under the laws of the United States with respect to maintenance of diplomatic relations or recognition shall be applicable with respect to Taiwan.

(c) For all purposes, including actions in any court in the United States, the Congress approves the continuation in force of all treaties and other international agreements, including multilateral conventions, entered into by the United States and the governing authorities on Taiwan recognized by the United States as the Republic of China prior to January 1, 1979, and in force between them on December 31, 1978, unless and until terminated in accordance with law.

(d) Nothing in this Act may be construed as a basis for supporting the exclusion or expulsion of Taiwan from continued membership in any international financial institution or any other international organization.

#### OVERSEAS PRIVATE INVESTMENT CORPORATION

SEC. 5. (a) During the three-year period beginning on the date of enactment of this Act, the \$1,000 per capita income restriction in clause (2) of the second undesignated paragraph of section 231 of the Foreign Assistance Act of 1961 shall not restrict the activities of the Overseas Private Investment Corporation in determining whether to provide any insurance, reinsurance, loans, or guaranties with respect to investment projects on Taiwan.

(b) Except as provided in subsection (a) of this section, in issuing insurance, reinsurance, loans, or guaranties with respect to investment projects on Taiwan, the Overseas Private Insurance Corporation shall apply the same criteria as those applicable in other parts of the world.

#### THE AMERICAN INSTITUTE OF TAIWAN

SEC. 6. (a) Programs, transactions, and other relations conducted or carried out by the President or any agency of the United States Government with respect to Taiwan shall, in the manner and to the extent directed by the President, be conducted and carried out by or through—

(1) The American Institute in Taiwan, a nonprofit corporation incorporated under the laws of the District of Columbia, or (2) such comparable successor nongovernmental entity as the President may designate, (hereafter in this Act referred to as "the Institute").

(b) Whenever the President or any agency of the United States Government is authorized or required by or pursuant to the laws of the United States to enter into, perform, enforce, or have in force an agreement or transaction relative to Taiwan, such agreement or transaction shall be entered into, performed, and enforced, in the manner and to the extent directed by the President, by or through the Institute.

(c) To the extent that any law, rule, regulation, or ordinance of the District of Columbia, or any State or political subdivision thereof in which the Institute is incorporated or doing business, impedes or otherwise interferes with the performance of the functions of the Institute pursuant to this Act, such law, rule, regulations, or ordinance shall be deemed to be preempted by this Act.

#### SERVICES BY THE INSTITUTE TO UNITED STATES CITIZENS ON TAIWAN

SEC. 7. (a) The Institute may authorize any of its employees on Taiwan—

(1) to administer to or take from any person an oath, affirmation, affidavit, or deposition, and to perform any notarial act which any notary public is required or authorized by law to perform within the United States;

(2) To act as provisional conservator of the personal estates of deceased United States citizens; and

(3) to assist and protect the interests of United States persons by performing other acts such as are authorized to be performed outside the United States for consular purposes by such laws of the United States as the President may specify.

(b) Acts performed by authorized employees of the Institute under this section shall be valid, and of like force and effect within the United States, as if performed by any other person authorized under the laws of the United States to perform such acts.

## TAX EXEMPT STATUS OF THE INSTITUTE

SEC. 8. (a) The Institute, its property, and its income are exempt from all taxation now or hereafter imposed by the United States (except to the extent that section 11(a)(3) of this Act requires the imposition of taxes imposed under chapter 21 of the Internal Revenue Code of 1954, relating to the Federal Insurance Contributions Act) or by any state or local taxing authority of the United States.

(b) For purposes of the Internal Revenue Code of 1954, the Institute shall be treated as an organization described in sections 170(b)(1)(A), 170(c), 2055(a), 2106(a)(2)(A), 2522(a), and 2522(b).

## FURNISHING PROPERTY AND SERVICES TO AND OBTAINING SERVICES FROM THE INSTITUTE

SEC. 9. (a) Any agency of the United States Government is authorized to sell, loan, or lease property (including interests therein) to, and to perform administrative and technical support functions and services for the operations of, the Institute upon such terms and conditions as the President may direct. Reimbursements to agencies under this subsection shall be credited to the current applicable appropriation of the agency concerned.

(b) Any agency of the United States Government is authorized to acquire and accept services from the Institute upon such terms and conditions as the President may direct. Whenever the President determines it to be in furtherance of the purposes of this Act, the procurement of services by such agencies from the Institute may be effected without regard to such laws of the United States normally applicable to the acquisition of services by such agencies as the President may specify by Executive order.

(c) Any agency of the United States Government making funds available to the Institute in accordance with this Act shall make arrangements with the Institute for the Comptroller General of the United States to have access to the books and records of the Institute and the opportunity to audit the operations of the Institute.

## TAIWAN INSTRUMENTALITY

SEC. 10. (a) Whenever the President or any agency of the United States Government is authorized or required by or pursuant to the laws of the United States to render or provide to or to receive or accept from Taiwan, any performance, communication, assurance, undertaking, or other action, such action shall, in the manner and to the extent directed by the President, be rendered or provided to, or received or accepted from, an instrumentality established by Taiwan which the President determines has the necessary authority under the laws applied by the people on Taiwan to provide assurances and take other actions on behalf of Taiwan in accordance with this Act.

(b) The President is requested to extend to the instrumentality established by Taiwan the same number of offices and complement of personnel as were previously operated in the United States by the governing authorities on Taiwan recognized as the Republic of China prior to January 1, 1979.

(c) Upon the granting by Taiwan of comparable privileges and immunities with respect to the Institute and its appropriate personnel, the President is authorized to extend with respect to the Taiwan instrumentality and its appropriate personnel, such privileges and immunities (subject to appropriate conditions and obligations) as may be necessary for the effective performance of their functions.

## SEPARATION OF GOVERNMENT PERSONNEL FOR EMPLOYMENT WITH THE INSTITUTE

SEC. 11. (a) (1) Under such terms and conditions as the President may direct, any agency of the United States Government may separate from Government service for a specified period any officer or employee of that agency who accepts employment with the Institute.

(2) An officer or employee separated by an agency under paragraph (1) of this subsection for employment with the Institute shall be entitled upon termination of such employment to reemployment or reinstatement with such agency (or a successor agency) in an appropriate position with the attendant rights, privileges, and benefits with the officer or employee would have had or acquired had



he or she not been so separated, subject to such time period and other conditions as the President may prescribe.

(3) An officer or employee entitled to reemployment or reinstatement rights under paragraph (2) of this subsection shall, while continuously employed by the Institute with no break in continuity of service, continue to participate in any benefit program in which such officer or employee was participating prior to employment by the Institute, including programs for compensation for job-related death, injury, or illness; programs for health and life insurance; programs for annual, sick, and other statutory leave; and programs for retirement under any system established by the laws of the United States; except that employment with the Institute shall be the basis for participation in such programs only to the extent that employee deductions and employer contributions, as required, in payment for such participation for the period of employment with the Institute, are currently deposited in the program's or system's fund or depository. Death or retirement of any such officer or employee during approved service with the Institute and prior to reemployment or reinstatement shall be considered a death in or retirement from Government service for purposes of any employee or survivor benefits acquired by reason of service with an agency of the United States Government.

(4) Any officer or employee of an agency of the United States Government who entered into service with the Institute on approved leave of absence without pay prior to the enactment of this Act shall receive the benefits of this section for the period of such service.

(b) Any agency of the United States Government employing alien personnel on Taiwan may transfer such personnel, with accrued allowances, benefits, and rights, to the Institute without a break in service for purposes of retirement and other benefits, including continued participation in any system established by the laws of the United States for the retirement of employees in which the alien was participating prior to the transfer to the Institute, except that employment with the Institute shall be creditable for retirement purposes only to the extent that employee deductions and employer contributions, as required, in payment for such participation for the period of employment with the Institute, are currently deposited in the system's fund or depository.

(c) Employees of the Institute shall not be employees of the United States and, in representing the Institute, shall be exempt from section 207 of title 18, United States Code.

(d)(1) For purposes of sections 911 and 913 of the Internal Revenue Code of 1954, amounts paid by the Institute to its employees shall not be treated as earned income. Amounts received by employees of the Institute shall not be included in gross income, and shall be exempt from taxation, to the extent that they are equivalent to amounts received by civilian officers and employees of the Government of the United States as allowances and benefits which are exempt from taxation under section 912 of such Code.

(2) Except to the extent required by subsection (a)(3) of this section, service performed in the employ of the Institute shall not constitute employment for purposes of chapter 21 of such Code and title II of the Social Security Act.

#### REPORTING REQUIREMENT

SEC. 12. (a) The Secretary of State shall transmit to the Congress the text of any agreement to which the Institute is a party. However, any such agreement the immediate public disclosure of which would, in the opinion of the President, be prejudicial to the national security of the United States shall not be so transmitted to the Congress but shall be transmitted to the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives under an appropriate injunction of secrecy to be removed only upon due notice from the President.

(b) For purposes of subsection (a), the term "agreement" includes—

(1) any agreement entered into between the Institute and the governing authorities on Taiwan or the instrumentality established by Taiwan; and

(2) any agreement entered into between the Institute and an agency of the United States Government.

(c) Agreements and transactions made or to be made by or through the Institute shall be subject to the same congressional notification, review, and approval requirements and procedures as if such agreements and transactions were made

by or through the agency of the United States Government on behalf of which the Institute is acting.

(d) During the two-year period beginning on the effective date of this Act, the Secretary of State shall transmit to the Speaker of the House of Representatives and the Committee on Foreign Relations of the Senate, every six months, a report describing and reviewing economic relations between the United States and Taiwan, noting any interference with normal commercial relations.

#### RULES AND REGULATIONS

SEC. 13. The President is authorized to prescribe such rules and regulations as he may deem appropriate to carry out the purposes of this Act. During the three-year period beginning on the effective date of this Act, such rules and regulations shall be transmitted promptly to the Speaker of the House of Representatives and to the Committee on Foreign Relations of the Senate. Such action shall not, however, relieve the Institute of the responsibilities placed upon it by this Act.

#### CONGRESSIONAL OVERSIGHT

SEC. 14. (a) The Committee on Foreign Affairs of the House of Representatives, the Committee on Foreign Relations of the Senate, and other appropriate committees of the Congress shall monitor—

- (1) the implementation of the provisions of this Act;
- (2) the operation and procedures of the Institute;
- (3) the legal and technical aspects of the continuing relationship between the United States and Taiwan; and
- (4) the implementation of the policies of the United States concerning security and cooperation in East Asia.

(b) Such committees shall report, as appropriate, to their respective Houses on the results of their monitoring.

#### DEFINITIONS

SEC. 15. For purposes of this Act—

(1) the term "laws of the United States" includes any statute, rule, regulation, ordinance, order, or judicial rule of decision of the United States or any political subdivision thereof; and

(2) the term "Taiwan" includes, as the context may require, the islands of Taiwan and the Pescadores, the people on those islands, corporations and other entities and associations created or organized under the laws applied on those islands, and the governing authorities on Taiwan recognized by the United States as the Republic of China prior to January 1, 1979, and any successor governing authorities (including political subdivisions, agencies, and instrumentalities thereof).

#### AUTHORIZATION OF APPROPRIATIONS

SEC. 16. In addition to funds otherwise available to carry out the provisions of this Act, there are authorized to be appropriated to the Secretary of State for the fiscal year 1980 such funds as may be necessary to carry out such provisions. Such funds are authorized to remain available until expended.

#### SEVERABILITY OF PROVISIONS

SEC. 17. If any provision of this Act or the application thereof to any person or circumstance is held invalid, the remainder of the Act and the application of such provision to any other person or circumstance shall not be affected thereby.

#### EFFECTIVE DATE

SEC. 18. This Act shall be effective as of January 1, 1979.

Approved April 10, 1979.

















